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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

KENNY RICHARDSON,
Petitioner,
v.

SECRETARY OF LABOR,
UNITED STATES DEPARTMENT OF LABOR,
and
FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether Petitioner Richardson, a mechanic, was denied equal protection of the laws under the Fifth Amendment when, because he worked for a corporate mine operator, he was held personally liable for a safety violation under a provision of the Federal Coal Mine Health and Safety Act which exempts from personal liability similarly situated employees who work in mines not operated by corporations.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner, Kenny Richardson, asks that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered on October 1, 1982. Petitioner's petition for rehearing *en banc* was denied on December 9, 1982.

PRIOR OPINIONS

The decision of the Sixth Circuit in *Richardson v. Secretary of Labor* is reported at 689 F.2d 632 (6th Cir. 1982) and appears at pages 1a-7a of the Appendix.

The decision of the Federal Mine Safety and Health Review Commission in *Secretary of Labor v. Richardson*

is reported at 3 FMSHRC 8 (1981) and appears at pages 8a-40a of the Appendix.

The decision of Administrative Law Judge Michels in *Secretary of Labor v. Richardson* is reported at 1 FMSHRC 874 (1979) and appears at pages 41a-70a of the Appendix.

JURISDICTION

The judgment of the court of appeals, entered on October 1, 1982, appears at page 71a of the Appendix. The order of the court denying Petitioner's timely petition for rehearing *en banc*, entered on December 9, 1982, appears at page 72a of the Appendix. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

CONSTITUTIONAL PROVISION INVOLVED

This case involves the following constitutional provision:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law."
>
> U.S. Const. amend. V.

STATUTE INVOLVED

This case involves the following provision of the Federal Coal Mine Health and Safety Act of 1969 ("Coal Act"):

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

Section 109(c), 30 U.S.C. § 819(c) (1976). The Coal Act has been since superseded by the Federal Mine Safety and Health Act of 1977 ("Mine Act") in which Section 109(c) has been renumbered Section 110(c), 30 U.S.C. § 820(c) (Supp. IV 1980).

STATEMENT OF THE CASE

The question in this case is whether it violates Petitioner Kenny Richardson's right to equal protection of the laws to punish him for an alleged "knowing" violation of a Coal Act regulatory standard. Richardson was fined because he was an employee of a corporate mine operator. Under the statute, had he been employed by any other kind of business entity, he could not have been held liable.

The Coal Act requires mine operators [1] to comply with detailed safety and health standards covering all aspects of coal mining. To ensure compliance, the Act provides for an array of civil and criminal penalties for violations of these standards.

One provision of the Coal Act, Section 109(a)(1),[2] subjects mine operators to strict liability for any violation and requires that civil penalties be imposed. *See, e.g., Allied Products Co. v. Federal Mine Safety and Health Review Comm'n*, 666 F.2d 890, 893 (5th Cir. 1982). Another provision, Section 109(b),[3] provides criminal penalties for willful violations by mine operators.

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[1] "'Operator' means any owner, lessee, or other person who operates, controls, or supervises a coal mine." 30 U.S.C. § 802(d) (1976). The Mine Act provision is identical in all relevant respects. See 30 U.S.C. § 802(d) (Supp. IV 1980).

[2] 30 U.S.C. § 819(a)(1) (1976). See 30 U.S.C. § 820(a) (Supp. IV 1980). This section mandates civil penalties for mine operators of up to $10,000 for each violation of the Act, including its mandatory safety and health standards.

[3] 30 U.S.C. § 819(b) (1976). See 30 U.S.C. § 820(d) (Supp. IV 1980). This section of the Act provides criminal penalties of

A third provision, Section 109(c),[4] imposes sanctions not on the mine operator but on certain employees of some operators. Under Section 109(c), officers, directors, and agents of corporate operators are subjected to personal liability for "knowing" violations. Agents of non-corporate mine operators are not included; thus non-corporate agents are exempt from any such liability. Section 3(e) of the Act broadly defines "agent" to include "any person charged with responsibility for the operation of all or part of a coal mine or the supervision of miners in a coal mine."[5] Although liable for "knowing" conduct, the individual agent need not have intended to commit a violation or even have known of a violation. It is enough that he "fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition." (App. 21a.)

Kenny Richardson is a day shift master mechanic at Peabody Coal Company's Sinclair Mine, a surface coal mine in Kentucky. In August, 1977 he was one of eight master mechanics responsible for keeping Peabody's mining equipment in proper repair. Of the 353 miners Peabody employed at the mine, Richardson supervised about ten (App. 43a, Tr. Vol. I, 39).

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not more than $25,000 or imprisonment for up to one year, or both, for a first offense; for subsequent offenses, the maximum fine is increased to $50,000 and the maximum prison term is increased to five years.

[4] See *supra* pp. 2-3. Section 109(c), by cross-reference, provides for civil penalties for individual corporate officers, directors and agents not to exceed $10,000 per violation, and criminal penalties of not more than $25,000 or imprisonment for up to one year, or both, for a first offense; for subsequent offenses, the maximum fine is increased to $50,000 and the maximum prison term is increased to five years.

[5] 30 U.S.C. § 802(e) (1976). The materially identical provision is contained in the Mine Act. See 30 U.S.C. § 802(e) (Supp. IV 1980).

On August 2, 1977, Richardson examined a previously reported crack in the boom of one of the draglines at the mine. Similar cracks had developed and been repaired many times before, and cracked equipment had operated without prior incident, so Richardson did not consider the machine to be unsafe (App. 45a-46a, 61a). The machine continued to operate for the 15 to 20 minutes remaining in Richardson's shift while Richardson had the necessary repair equipment brought over and discussed repair arrangements with his counterpart on the incoming shift. Ten hours after Richardson's shift ended and after he had gone home, a miner was killed while repairing the machine (App. 45a-49a).

The Department of Labor's Mine Safety and Health Administration investigated the accident and charged Peabody, the mine operator, with a violation of a mandatory safety standard which requires that "equipment in unsafe condition shall be removed from service immediately." 30 C.F.R. § 77.404(a). This Petition is before the Court because the Secretary of Labor separately charged Richardson under Section 109(c) with "knowingly" carrying out the violation. Richardson was so charged because he was employed by a mine operator doing business as a corporation.

On administrative review, the Administrative Law Judge found that the dragline had been operated while in an unsafe condition, and therefore that corporate mine operator Peabody Coal Company had violated the standard (App. 50a-51a). He found that Richardson had supervisory authority over the dragline on the first shift, and therefore held that Richardson was Peabody's agent (App. 54a). Finally, he found that the crack in the boom "was the kind of situation which would raise a person's suspicion . . . that something bad was happening which could well endanger personnel in this area." (App. 61a-62a.) On these bases, he held that Richardson had violated

the Act and imposed a $500 civil penalty against him personally under Section 109(c).[6]

In a split decision, the Federal Mine Safety and Health Review Commission affirmed, rejecting Richardson's defense that the statute unconstitutionally discriminated against employees of corporations. (App. 34a.) On review pursuant to 30 U.S.C. § 816(a)(1), a divided Sixth Circuit panel affirmed.

In response to Richardson's equal protection argument, the Sixth Circuit panel majority held that imposing personal liability on corporate agents like Richardson, but not on employees or agents of non-corporate mining entities, "is rationally related to the purpose of the Act—the enhanced safety of the mine worker." (App. 4a.) Because the court assumed that sole proprietors or partners were personally liable as "operators" and could not pass off penalties for violations as a cost of doing business as could a corporation, it believed that the agents of sole proprietorships or partnerships had a greater incentive to comply with the law. (App. 3a-4a.) The court held that Congress could therefore constitutionally exempt non-corporate agents from the liability it imposed on their corporate equals.

The dissenting judge, echoing the Commission minority, could conceive no rational basis for singling out employees of corporations for liability while immunizing employees who work for other kinds of mining companies. On the contrary, the dissent viewed the exculpation of a substantial class of potential wrongdoers from liability for safety and health violations as an arbitrary and irrational impediment to Congress's stated purpose of protecting the health and safety of *all* miners. (App. 6a-7a; 39a.)

Richardson timely filed a petition for rehearing *en banc*, which was denied on December 9, 1982.

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[6] Peabody Coal Company, without contest, had earlier paid penalties administratively assessed against the corporation.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals' Decision is in Conflict With the Applicable Decisions of this Court.

A. *It is Arbitrary to Exempt Non-Corporate Agents.*

Although Congress is afforded substantial constitutional latitude in its treatment of different groups or persons in the realm of social and economic regulation, this Court has "consistently . . . required that legislation classify the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981); *see G.D. Searle & Co. v. Cohn*, —— U.S. ——, 102 S. Ct. 1137, 1141 (1982). The Court has expressly applied this requirement to strike down classifications based on corporate status when the differential treatment was "inconsistent with the declared object of the legislation." *Liggett Co. v. Lee*, 288 U.S. 517, 536 (1933).

The decision of the panel majority conflicts with both the general standard reflected in *Schweiker* and its specific application in *Liggett*. Although the panel acknowledged and purported to apply this standard, it blithely ratified a classification that is, in fact, fundamentally arbitrary and inconsistent with the statute's expressed purpose.

Although the panel majority acknowledged that the purpose of the statute was to improve health and safety by imposing civil and criminal sanctions for noncompliance with federal safety standards in *every* mine (App. 3a),[7] it approved a statutory scheme designed to punish—either civilly or criminally, at the choice of the government—only supervisory employees who work at *some* of

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[7] For example, Congress extended the Act's regulatory safety and health protections to govern even mines owned and operated by one person. *See Marshall v. Donofrio*, 465 F. Supp. 838, 840 (E.D. Pa. 1978), *aff'd*, 605 F.2d 1196 (3d Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980).

those mines. Substantial numbers of miners work in non-corporate mines where agents of the mine operator are free from personal liability, no matter how egregious their acts may be. The exemption from personal liability for agents who are employed by joint ventures, partnerships, or sole proprietorships is inconsistent with the remedial statutory purpose and impermissibly irrational.

This section of the statute is not saved by the panel majority's invocation of the rule that Congress may act to remedy one part of a problem and ignore the rest. (App. 4a.) First, the language of the statute itself makes it unmistakably clear that Congress intended to regulate comprehensively safety and health conditions in *all* of the Nation's mines.[8] All mine operators undergo regular government inspection; all are equally liable for penalties for violations. Section 109(c) stands alone in effectively singling out some mines—those not operated by corporations—for a partial exemption from the Act by immunizing their agents from any personal liability.

Second, the rule relied on by the panel majority may not be applied in isolation from the overarching "rational basis" principle which it qualifies. There is no justifica-

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[8] "*Each coal mine . . . and each operator* of such mine, *and every miner* in such mine shall be subject to the provisions of this Act." § 4, 30 U.S.C. § 803 (emphasis added). *See also* § 2(a)-(g), 30 U.S.C. § 801(a)-(g). As the legislative history emphasizes, the statute was not an experimental legislative foray into an uncertain area. Congress intended sweeping changes in the mining business when it adopted Section 109(c) of the Coal Act because "[*f*]*or too long the Congress has countenanced* the passage of *piecemeal measures which have failed* . . . to protect the men who extract one of our Nation's most vital resources." H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 6 (1969) (emphasis added). *See also, e.g.*, Staff of Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969* 239, 242 (Comm. Print 1975) (floor statement of Senate prime sponsor describing Act's "across-the-board comprehensive attack" on safety and health problems at "all mines").

tion for underinclusiveness here. This is not a situation "where a demand for completeness may lead to total paralysis," L. Tribe, *Constitutional Law* 997 (1978); or where a line must be drawn, though it "will leave some comparably [situated] person outside the favored circle," *Schweiker v. Wilson*, 450 U.S. at 238 (footnote omitted); *see Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41 (1928) (Holmes, J., dissenting); or where the evils are "of different dimensions . . . requiring different remedies." *Williamson v. Lee Optical*, 348 U.S. 483, 489 (1955). Nor is there here any other circumstance that warrants acceptance of classificatory imperfection "because it is in turn rationally related to the secondary objective of legislative convenience." *Vance v. Bradley*, 440 U.S. 93, 109 (1979). There is simply no reason to expose agents of corporations, large or small, closely held or otherwise, to substantial civil and criminal liability while exempting their peers at neighboring mines solely because those mines are operated by joint ventures, corporate partners, limited partnerships or other proprietary forms.

This Court has held that the "rational-basis standard is 'not a toothless one'," *Schweiker v. Wilson*, 450 U.S. at 234, *quoting Mathews v. Lucas*, 427 U.S. 495, 510 (1976). The decision below must be reversed if this standard is to retain any bite at all.

B. *It is Arbitrary to Punish Low-Level Corporate Employees.*

Even if it were permissible for Congress to subject only corporate agents to personal liability because of some perceived disparity in compliance incentives between corporations and other business organizations,[9] the statute is

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[9] There is no indication in the legislative history that Congress believed agents of non-corporate mines had any greater incentive to comply with the Act than their corporate counterparts. Nowhere in the published hearings, committee reports, or debates is there any discussion of different compliance environments at non-

unconstitutional as applied to Richardson. Congress may arguably have had a rational basis for exposing only officers, directors, and top-level management officials of corporate operators to personal liability on the theory that without such liability, corporate management would be shielded from the deterrent effects of personal responsibility for health and safety violations. Congress may have thought that the principal decisionmakers of non-corporate mining companies were already effectively exposed to liability under the general provisions of the statute which make "operators" liable for violations. But, as applied to Richardson, Section 109(c) goes far beyond equalizing exposure to liability between the principal decisionmakers in corporate and non-corporate entities. It extends exposure to criminal and civil liability to the lowest supervisory level in corporations while exempting a person in an identical position in a non-corporate mine from such liability, even if the conduct of both low-level supervisors is exactly the same.

The arbitrariness of applying Section 109(c) to low-level agents like Richardson is stark. Had Richardson been employed at a non-corporate mine he could not have been prosecuted by the Government, threatened with a potential $10,000 civil penalty or criminal fines and jail, nor have suffered the $500 penalty imposed in this case. Yet the lower court ruling means that, because of their employer's business structure, low-level supervisory employees of corporate mines must live in fear of substantial liability

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corporate and corporate mines. On the contrary, the legislative history expressly recognizes that smaller mines (like the ones supposed by the Sixth Circuit to be operated by non-corporate entities) are, if anything, more dangerous than larger mines. *See* H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 6 (1969). Although there are several comments by the operative House and Senate committees which make clear that Congress intended to make corporate agents personally liable, there is nothing to indicate that it intended to exempt non-corporate agents. Given the above described inconsistency with the statutory purpose of such an exclusion, it seems reasonable to conclude that the arbitrary classification resulted from congressional confusion, inadvertence, or oversight.

for what hindsight may reveal to have been a mistake in judgment.

Congress made corporate officers, directors, and agents liable in order to influence "the basic business judgments which dictate the method of operation of a coal mine." S. Rep. No. 91-411, 91st Cong., 1st Sess. 39 (1969). Those business judgments are not made by lower-level crew foremen or master mechanics like Richardson. The authority and responsibility of these blue-collar employees who may supervise a handful of other miners or control a machine is indistinguishable from mine to mine, regardless of its ownership structure. They are no more responsible for their employer's violations than are their non-corporate peers.

Although Congress need not demarcate "with mathematical nicety," *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), those who will be personally liable from those who will not according to the distribution of corporate decisionmaking authority, nor need this Court do so to decide this case, the decision of the court below clearly exceeded constitutional bounds when it made such lower-level employees liable for violations only if they work for corporations. Whatever rationale there may be for distinguishing between top corporate and non-corporate officials, it is arbitrary to apply this scheme to low-level "agents" like Richardson. Wherever the dividing line may properly lie, it lies far above Richardson.

When Section 109(c) is applied to impose liability on a mechanic employed by a corporation and not on a mechanic employed by a partnership, though they may be working side by side at a multi-employer worksite, that statute does not satisfy the constitutional requirement that a classification " 'must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.' *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)." *Johnson v. Robison*, 415 U.S. 361, 374-375 (1974) (quoting *Reed v. Reed*,

404 U.S. 71, 75-76 (1971)). *See also Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966). The decision below undermines this fundamental principle long protected by the Court. By failing in its duty to construe the statute to avoid constitutional defect, *see United States v. Rumely*, 345 U.S. 41, 45 (1953), the court below sanctioned unlawful discrimination against Richardson and should be reversed.[10]

II. The Court of Appeals' Decision Presents Very Important Questions Concerning Deterrence of Corporate Misconduct.

The panel majority has sanctioned subjecting a low-level corporate employee, but not an identically situated employee of a partnership or other non-corporate business entity, to civil and criminal liability when his employer is strictly liable for a regulatory violation. Based on stereotypical assumptions about corporate behavior and unfounded assertions about deterrence in a business context, the panel majority in an analytic vacuum has approved a scheme that most unfairly discriminates against corporate employees without benefit of effective purpose.

Congress,[11] courts,[12] and commentators[13] have been struggling with important issues concerning how effec-

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[10] If Congress, on the other hand, did intend to include low-level agents like Richardson, the statute is to that extent unconstitutional on its face and the decision below must be overturned.

[11] *See, e.g.*, S. Rep. No. 97-307, 97th Cong., 1st Sess. 89 (1981) (controversy regarding provisions for liability of agents in proposed federal criminal code); Staff of the Subcomm. on Crime of the House Comm. on the Judiciary, 96th Cong., 2d Sess., *Corporate Crime* (Comm. Print 1980) (background for H.R. 7040, a bill making it an offense to fail to report or warn of dangers from business products or practices).

[12] *See, e.g., Levas and Levas v. Village of Antioch*, 684 F.2d 446, 455-456 (7th Cir. 1982); *United States v. New England Grocers Supply Co.*, 488 F. Supp. 230, 234, 235-236 (D. Mass. 1980).

[13] *See, e.g.*, Braithwaite, *Enforced Self-Regulation: A New Strategy for Corporate Crime Control*, 80 Mich. L. Rev. 1466

tively to deter and punish business violations of proliferous modern regulatory requirements. Statutory approaches to punishing business misconduct entail various allocations of responsibility between business entities and the individuals who control them.[14] Although equal protection principles permit reasonable legislative initiatives in search of effective allocations of liability for business misconduct, they do preclude patently arbitrary classifications.

The arbitrariness of punishing corporate agents and not other agents for the mine operator's violations is apparent when the presumed legislative purpose is examined. The panel majority stated that Congress rationally made corporate agents liable in order to correct the imbalance in compliance incentives between corporations and non-corporate structures. The panel rationalized that corporate operators can pass off penalties as a cost of doing business without any individual being personally liable whereas sole proprietors or partners are already personally liable as "operators." (App. 3a.)

The conclusion that this distinction between business structures (and the influence they may have on the upper-level managers who guide them) justifies discriminating between low-level employees is irrational in numerous

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(1982); Leigh, *The Criminal Liability of Corporations and Other Groups: A Comparative View*, 80 Mich. L. Rev. 1508 (1982); Abrams, *Criminal Liability of Corporate Officers for Strict Liability Offenses: A Comment on Dotterweich and Park*, 28 U.C.L.A. L. Rev. 463 (1981); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227 (1979); Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 Colum. L. Rev. 1435 (1979).

[14] *Compare* the Clean Water Act, 33 U.S.C. § 1319 (civil liability for individuals, corporations, partnerships, associations, and governmental units; criminal liability for same plus any "responsible corporate officer") *with* the Occupational Safety and Health Act, 29 U.S.C. § 666 (civil and criminal liability for "employers").

respects. First, even assuming that there were an imbalance in compliance incentives between archetypal, publicly held corporate operators and small non-corporate operators, there is no such imbalance between a corporate operator and an operator which is a partnership of corporations, nor between a closely held corporate operator and a partnership of natural persons. Discriminating among the agents of these common mining entities is neither rational nor consistent with the broader legislative purpose to ensure safety in all mines.

Second, it does not create more of a compliance incentive equivalency between corporate and non-corporate operators to make corporate agents subject to criminal liability for their "knowing" involvement in the mine operator's strict liability offenses. Non-corporate operators, like corporate operators, only face criminal liability for "willful" violations (Section 109(b), 30 U.S.C. § 819(b) (1976)) [15] which require a greater *mens rea* than "knowing." *See United States v. Consolidation Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974). Since non-corporate operators thus do not face personal criminal liability for violations knowingly committed by their agents, there is no non-corporate compliance incentive which needs to be replicated in the corporate context by the statute's imposition of personal criminal liability on corporate agents for knowing violations.

Third, the court of appeals misses the point with its observation about corporate operators "pass[ing] off" civil penalties when sole proprietorships and partnerships cannot. (App. 3a.) Civil penalties under this Act are a deterrent. Congress provided six factors for determining how large a penalty should be assessed and one factor—the size of the operator's business—was especially designed to allow larger penalties for larger operators, as necessary for purposes of deterrence. *See* Section 109(a)

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[15] *See* Section 110(d), 30 U.S.C. § 820(d) (Supp. IV 1980).

(1). A civil penalty is an extra cost to any mining business. How it is absorbed does not depend on the form of its business.

Fourth, and most importantly, if the congressional purpose were to achieve greater compliance incentive equivalency between corporations and other forms of business, Congress could have achieved this by making officers and directors and other top management officials who set corporate policy personally liable for the corporation's violations, without making lower-level agents any more liable than they are in non-corporate enterprises. *See United States v. Park*, 421 U.S. 658, 672 (1975). Making their foremen and their mine mechanics personally liable does not expose top corporate decisionmakers to the same liabilities faced by non-corporate operators—if anything, it may even reduce the vulnerability of top corporate officials and thus their compliance incentive, by affording ready scapegoats for what may really be lapses in corporate compliance policy. "Such a classification is not based on anything having relation to the purpose for which it is made." *Smith v. Cahoon*, 283 U.S. 553, 567 (1931) (citations omitted).

The panel decision fails to address the very serious constitutional questions the statute raises regarding the regulation of corporate misconduct. The Court should resolve a matter of such national significance.

CONCLUSION

For the reasons stated herein, a writ of certiorari should issue and the decision of the Sixth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
SIXTH CIRCUIT

No. 81-3060

KENNY RICHARDSON,
Petitioner,

v.

SECRETARY OF LABOR; MINE SAFETY AND HEALTH REVIEW COMMISSION,
Respondent.

Argued April 23, 1982

Decided Oct. 1, 1982

Rees Kinney, Jarvis, Payton & Kinney, Greenville, Ky., for petitioner.

Mine Safety & Health Review Comm., Washington, D.C., Thomas A. Mascolino, Dept. of Labor, Arlington, Va., Michael A. McCord, Debra L. Feuer, Linda Leasure, for respondent.

Before EDWARDS, Chief Circuit Judge, CONTIE, Circuit Judge, and ENSLEN *, District Judge.

CONTIE, Circuit Judge.

This is an appeal from the findings of the Federal Mine Safety and Health Review Commission. Petitioner Richardson is a master mechanic employed by Peabody Coal Company at their Sinclair Mine; his primary duty is to supervise repair of the mine's strip-mining equipment.

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* Honorable Richard A. Enslen, U.S. District Judge, Western District of Michigan, sitting by designation.

In August of 1977, the boom of the mine's dragline fell while it was being repaired; one worker was killed. An investigation of the accident led the Secretary of Labor to file a petition for assessment of civil penalty against Richardson pursuant to 30 U.S.C. § 819(c).[1] A hearing was held before an administrative law judge. The ALJ found that Richardson had knowingly violated a mandatory safety standard, and assessed him a fine of $500.00. Richardson filed a petition for discretionary review before the Federal Mine Safety and Health Review Commission. The Commission affirmed the decision of the ALJ.

Title 30 U.S.C. § 819 provides for civil penalties, in subsections (a) and (b), against a mine operator who violates a mandatory health or safety standard under the Act and, in subsection (c), against any director, officer, or agent of a corporate operator, who knowingly authorizes, orders or carries out such violation.

Petitioner challenges the constitutionality of § 819(c), arguing that the distinction between agents of corporate operators and agents of non-corporate operators violates the equal protection guarantee contained in the due process clause of the fifth amendment.[2] He contends that insofar as his liability hinges solely upon the business organization of his employer, the statute is arbitrary and capricious. The Court does not agree.

A federal statute dealing with economic regulation comes to the court with a presumption of constitutionality. *Duke Power Company v. Carolina Environmental Study Group*, 438 U.S. 59, 98 S.Ct. 2620, 57 L.Ed.2d 595

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[1] The Coal Act has been amended since the time of the alleged violation, but the pertinent language remains unchanged. Former Section 819(c) is now Section 820(c). The Company was also assessed a penalty, which it did not contest.

[2] *Bolling v. Sharpe*, 347 U.S. 497, 74 S.Ct. 693, 98 L.Ed. 884 (1954).

(1978). In areas of economic regulation, the courts have consistently deferred to legislative determinations as to the desirability of particular statutory discriminations. *City of New Orleans v. Dukes*, 427 U.S. 297, 96 S.Ct. 2513, 49 L.Ed.2d 511 (1976). Unless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, its constitutionality is presumed and the challenged classification need only be rationally related to a legitimate governmental interest. *Id.*

The purpose of the Federal Coal Mines Health & Safety Act, 30 U.S.C. § 801 *et seq.*, is to increase the health and safety of the mining industry's "most precious resource—the miner," by requiring *inter alia* that every operator and miner comply with federally promulgated health and safety standards. 30 U.S.C. § 801. To this end, the Act imposes personal liability on mine operators for violations of the federal standards.

The legislative intent behind subsection 819(c) was to assure that the decision-makers responsible for illegal acts of corporate operators would also be held personally liable for violations. S.Rep. No. 411, 91st Cong., 1st Sess. 39 (1969). In a practical sense, any non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of "operator." In a larger, corporate structure, the decision-maker may have authority over only a part of the mining operation. Subsection 819(c) assures that this makes him no less liable for his actions.

In a noncorporate structure, the sole proprietor or partners are personally liable as "operators" for violations; they cannot pass off these penalties as a cost of doing business as a corporation can. Therefore, the noncorporate operator has a greater incentive to make certain that his employees do not violate mandatory health or safety standards than does the corporate operator. Subsection 819(c) attempts to correct this imbalance by giv-

ing the corporate employee a direct incentive to comply with the Act. *See Cowin & Co. v. Federal Mine Safety & Health Review Commission*, 612 F.2d 838 (4th Cir. 1979).

The congressional intent behind § 819(c), to hold an additional group of decision-makers personally liable, is rationally related to the purpose of the Act—the enhanced safety of the mine worker.

The failure to include agents of non-corporate operators does not make the classification arbitrary and capricious. The underinclusiveness of a legislative classification will not alone render it unconstitutional. The legislature may act to remedy part of a problem only. *Railway Express Agency v. New York*, 336 U.S. 106, 69 S.Ct. 463, 93 L.Ed. 533 (1949). The legislature may even "select one phase of one field and apply a remedy there, neglecting the others." *Cleland v. National College of Business*, 435 U.S. 213, 220, 98 S.Ct. 1024, 1028, 55 L.Ed.2d 225 (1978), quoting *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563 (1955). As noted above, Congress may have thought that the imposition of personal liability on corporate agents would do much to further mine safety while the imposition of liability on noncorporate agents would do less, and consequently have decided to attack one problem and ignore the other. Because the classification is rationally related to the ends of the Federal Mine Safety & Health Act, 30 U.S.C. § 819(c) does not violate the federal guarantee of equal protection.

The findings of the Federal Mine Safety and Health Review Commission are affirmed.

ENSLEN, District Judge, dissenting:

As the following passage makes clear, Congress intended to protect the health and safety of a precious national resource, the miner, when it enacted the Federal

Mine Safety and Health Act of 1977.[1] It is equally obvious that Congress intended the protections to apply to all miners whether they were employed by corporations, partnerships, or sole proprietorships. 30 USC § 801 states:

> **Congressional findings and declaration of purpose**
>
> Congress declares that—
>
> (a) the *first priority* and concern of *all* in the coal or other mining industry must be the health and safety of its most precious resource—the miner;
>
> (b) deaths and serious injuries from unsafe and unhealthful conditions and practices in the coal or other mines cause grief and suffering to the miners and to their families;
>
> (c) there *is an urgent need to provide more effective means and measures* for improving the *working conditions and* practices in the Nation's coal or other mines *in order to prevent death* and *serious physical harm*;
>
> (d) the *existence of unsafe and unhealthful conditions* and practices in the Nation's coal or other mines *is a serious impediment* to the *future growth* of the coal or other mining industry *and cannot be tolerated*;
>
> (e) the operators of such mines with the assistance of the miners have the primary responsibility to prevent the existence of such conditions and practices in such mines;
>
> (f) the disruption of production and the loss of income to operators and miners as a result of coal or

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[1] The Federal Coal Mine Health and Safety Act of 1969, 30 USC § 801, *et seq.* (1976) (The Coal Act) was amended and renamed the Federal Mine Safety and Health Act of 1977 (The Mine Act) 30 USC § 801 *et seq.* Section 110(c) of the Mine Act, 30 USC § 820(c) is identical with Section 109(c) of the Coal Act which was in effect when the violation at issue took place.

other mine accidents or occupationally caused diseases unduly impedes and burdens commerce; and

(g) It is the purpose of this chapter (1) to establish interim mandatory health and safety standards and to direct the Secretary of Health and Human Services and the Secretary of Labor to develop and promulgate improved mandatory health or safety standards to protect the health and safety of the Nation's coal or other miners; (2) to require that *each operator* of a coal or other mine and every miner in such mine *comply* with such standards; (3) to cooperate with, and provide assistance to, the States in the development and enforcement of effective State coal or other mine health and safety programs; and (4) to improve and expand, in cooperation with the States and the coal or other mining industry, research and development and training programs aimed at preventing coal or other mine accidents and occupationally caused diseases in the industry.

As amended Pub.L. 95-164, Title I, § 102(a), Nov. 9, 1977, 91 Stat. 1290. (Emphasis supplied)

I am well aware that when neither a suspect class nor a fundamental right is involved, courts will conduct a generally relaxed inquiry into allegations that a particular statute violates the equal protection provisions of the Constitution, and will defer to the Congress if the classification rationally furthers the purpose identified by the legislature. However, I find that Section 820(c) of the Act does not withstand even minimal scrutiny as the classification involved is both arbitrary and contrary to Congressional intent. *See Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

For the same reasons expressed by Chairman Backley of the Federal Mine Safety and Health Commission, I conclude that establishing personal liability for one classifi-

cation of wrongdoers, (the corporate agent), while exculpating another (the non-corporate agent), does not rationally further Congress' stated purpose to protect *all* miners and to assure that all mine operators and miners comply with health and safety standards. Safety in the mine does not depend upon the legal status of the agent who violates the Act, but is logically a function of the actions and decision-making of the violator. Consequently, a statute which artificially distinguishes between categories of wrongdoers, imposing liability solely because of the organizational structure of their employers, rather than focusing upon the violations involved, does not rationally further either a health or safety objective or the expressed legislative purpose as defined by the statute. Therefore, I respectfully dissent and would reverse the decision of the Commission.

APPENDIX B

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION
1730 K Street NW, 6th Floor
Washington, D.C. 20006

January 19, 1981

Docket No. BARB 78-600-P

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA)

v.

KENNY RICHARDSON

DECISION

This case presents several issues arising out of an alleged violation of section 109(c) of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq.* (1976) ("the Coal Act" or "the Act").[1] In his decision, the administrative law judge concluded that Kenny Richardson, Peabody Coal Company's (Peabody) day shift master mechanic, had "knowingly authorized, ordered, or carried out a violation of 30 CFR § 77.404(a)". He

[1] The alleged violation occurred when the Coal Act was in effect. The Secretary of Labor filed a petition for assessment of civil penalty on July 28, 1978, after the effective date of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 *et seq.* (Supp. III 1979) ("the Mine Act"). Thus, while the alleged violation arose under the Coal Act, the case has been processed under the Mine Act review procedures. Section 109(c) of the Coal Act and section 110(c) of the Mine Act are identical except for the redesignation of other affected sections. Therefore, although our analysis would be the same under either Act, this decision discusses the violation in terms of the statute in effect at the time the alleged violation occurred, the Coal Act.

found Richardson individually liable pursuant to section 109(c) and assessed a $500 penalty against him.[2] For the reasons below, we affirm the judge.

On August 4, 1977, a federal mine inspector issued to Peabody a notice alleging that it had violated 30 CFR § 77.404(a) because:

> [m]obile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service.[3]

The inspector issued the notice following his investigation of a fatal accident that had occurred while the boom was being repaired, after the dragline had been removed from service.

On July 28, 1978, the Secretary of Labor filed a petition for assessment of civil penalty against Richardson.[4] Richardson contested the action and a hearing was held. From the administrative law judge's decision finding him in violation of section 109(c) of the Coal Act, Richardson filed a petition for discretionary review. We granted the petition for review and heard oral argument.

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[2] The judge concluded that Richardson had not "knowingly" violated another cited standard, 30 CFR § 77.405(a). No issue concerning the judge's disposition of this alleged violation is before us on review.

[3] A dragline is "A [crane-like] type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket toward itself on the ground with a second rope, elevates the bucket and dumps the material on a spoil bank, in a hopper, or on a pile." *Dictionary of Mining, Mineral and Related Terms*, at 346 (Department of Interior, 1968).

[4] Peabody was cited separately for a violation of the same mandatory standard, but was not named as a party-respondent to the instant proceeding. Peabody did not contest the charges against it and paid the penalties assessed.

The issues before us are: [5]

(1) Is the Interior Board of Mine Operations Appeals' decision in *Everett L. Pritt*, 8 IBMA 216 (1977), correct insofar as it held that the corporate operator need not be a party to a section 109(c) proceeding against the corporate agent;

(2) Did the judge err in finding that the dragline was unsafe while it was in service;

(3) Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act;

(4) Did the judge err in concluding that Richardson knowingly permitted an unsafe dragline to remain in service in violation of 30 CFR § 77.404(a);

(5) Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on agents of corporate operators?

Was the Board correct in Pritt?

In its decision in *Everett L. Pritt*, the Interior Board of Mine Operations Appeals concluded that the corporate operator need not be a party to a section 109(c) proceeding against an agent, even though a necessary predicate for an agent's liability under section 109(c) is a finding that the operator violated the Act. Richardson urges that the Commission not follow the Board's *Pritt* decision, asserting that section 109(c) requires that a corporate operator must be found to have violated a mandatory standard, in a proceeding to which the operator is a party, before liability can be imposed on the corporate agent. Richardson submits that because the Secretary did not name Peabody as a party-respondent to the present proceeding, and because Peabody's failure to contest the vio-

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[5] Our statement of the issues restates, but encompasses, the issues raised in the petition for discretionary review.

lation alleged against it should not constitute an admission of liability, he cannot be held liable.

Section 109(c) of the Coal Act provides:

> Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any order incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) of this section or section 110(b)(2) of this title, any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

We find the language of section 109(c) and its legislative history to be ambiguous and not dispositive of the question presented. Consequently, we have considered the arguments for and against the *Pritt* decision, and are persuaded by the strong practical arguments underlying the Board's decision. Here the corporate operator, Peabody, paid the penalty sought against it prior to formal assessment or a hearing. In doing so, the corporate operator exercised its rights under the statute and the applicable regulations not to contest the Secretary's allegation of a violation and proposed penalty, and by operation of statute it became a final order of the Commission not reviewable by any court or agency. 30 U.S.C. 815(a); 30 CFR Part 100. As a result of the operator's failure to contest the alleged violation, the Secretary could not have secured an adjudication on the merits that the operator violated the standard. Thus, unless the Secretary can prove the corporate operator's violation of the standard as an element of proof in its case against the agent, it would be impossible to reach the agent under section 109(c) in those cases where, as here, the operator paid the

proposed penalty and thereby avoided a hearing on the merits.

Conversely, we are unpersuaded by the arguments in opposition to *Pritt*. First, the rationale of *Pritt* does not jeopardize either the agent's or the operator's due process rights. As did the Board, we believe that due process does not require a determination of the operator's violation in a proceeding separate from that in which the agent is found liable. The operator is not at risk for a penalty in the proceeding against the agent. Whether or not the operator is found liable in a separate proceeding, the Secretary must still fully prove his case in a section 109(c) proceeding against the agent. The operator's violation is merely an element of proof in the Secretary's case against the agent. Thus, the agent's due process rights are amply protected by this procedure; he has notice and an opportunity to be heard in the proceedings against him, including the opportunity to contest the threshold allegation that the operator violated the standard.

Second, a proceeding against only the agent does not necessarily permit the operator to escape without cost. Here the operator paid penalties prior to litigation. Such a procedure conserves the operator's and the government's resources by eliminating the need for a potentially protracted and costly administrative proceeding against the operator.

Third, we find the rationale of the dissent in *Pritt* unpersuasive. While Congress stated that the agent should not bear the brunt of corporate violations, it stated also that an agent should "stand on his own and be personally responsible for any penalties or punishment meted out to him."[6] There is no indication in the legislative history

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[6] Rep. John H. Dent (D.-Pa.), House Debate on H.R. 13950, 91st Cong., 1st Sess. (1969); reprinted in Senate Subcommittee on Labor, Committee on Labor and Public Welfare, 94th Cong., 1st Sess., *Legislative History of the Federal Coal Mine Health and Safety Act of 1969*, Part I at 1191 (1975). ("Legis. Hist.").

that Congress intended to foreclose a penalty proceeding against an agent because the operator was not also a party, or that it intended to require that a separate proceeding be held to determine if the operator violated the standard. Also, we note that the dissent misconstrued the law in stating that in the absence of section 109(c), the "corporate shield" would protect a corporate agent from personal liability. We note that the corporate shield, as that term is normally used, does not protect agents; it protects shareholders. I. E. Fletcher, *Cyclopedia of the Law of Private Corporations*, § 41.3 at 192-193 (rev. perm. ed. 1974). Therefore, in the absence of section 109(c), agents would be protected not by the corporate shield, but rather by the statute's general enforceability against operators.

For these reasons, we conclude that the Board's decision in *Pritt* correctly interpreted and applied section 109(c).

Did the judge err in finding that the machine was unsafe while in service?

The cited standard, 30 CFR § 77.404(a), provides:

> Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately.

The administrative law judge found that the 1260 dragline "was unsafe to operate and pursuant to 30 CFR § 77.404(a) should have been removed from service immediately." Richardson challenges the judge's finding. We conclude that the judge's finding is supported by substantial evidence of record and must be affirmed.

Richardson asserts that the judge's finding of unsafeness was not supported by substantial evidence and that the evidence "compels the opposite conclusion". He argues that the finding of unsafeness is inconsistent with other findings made by the judge: that later repairs weakened the lower chord and caused it to break; that

the crack was not considered unusual; and that the chord had been repaired numerous times. Richardson contends further that the judge's finding, based in part on a letter from the dragline's manufacturer after the accident, is unsound because the manufacturer's field repair instructions do not mention any unsafeness. He also argues that the accident was caused by a design defect, not by an unsafe machine.[7]

The Secretary submits that Richardson "has . . . ignored the basic legal principles pertaining to substantial evidence," because "[i]t is axiomatic . . . that a judge's finding cannot be overturned merely because . . . the judge could have made a contrary finding." The Secretary asserts that the judge could have, and did, reasonably conclude that the lower chord was cracked in all but 9 inches of its 38-inch circumference at the time of Richardson's inspection; that the crack was in a location

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[7] We reject, without extended discussion, two further challenges made by Richardson to the sufficiency of the evidence. Richardson argues that the judge's findings were not supported by substantial evidence because the Secretary purportedly based his entire case on uncorroborated hearsay evidence. First, evidence is admissible in an administrative proceeding so long as it is not immaterial or irrelevant. Administrative Procedure Act, 5 U.S.C. § 556(d) (Supp. III 1979). *Richardson* v. *Perales*, 402 U.S. 389 (1971). The hearsay evidence relied on by the judge in this case was both material and relevant; it related to the safeness of the dragline and to Richardson's knowledge. Second, the judge relied only in part on hearsay evidence. Virtually all of the hearsay regarding unsafeness and knowledge was corroborated by direct evidence. See discussion, *infra*, at 6.

Richardson asserts also that the proper standard of proof to be applied by the administrative law judge is "direct and clearly convincing." The usual standard of proof required in an administrative proceeding is a preponderance of the evidence, and we hold that this is the appropriate standard of proof in proceedings before Commission administrative law judges. *See* 2 *Am. Jur. 2d.* Admin. Law § 932, at 199. In any event, the Mine Act imposes a substantial evidence test for Commission review of findings of material fact. 30 U.S.C. § 823(d)(2).

which had been repaired on numerous previous occasions; and that the crack would continue to enlarge, thus permitting a reasonable inference that the dragline was unsafe.

An observation may help to clarify our discussion and resolution of the question of the dragline's unsafeness. A fatal accident occurred after the machine had been taken out of service and was under repair, after the violation at issue allegedly had occurred. Although this fatality is irrelevant to whether Richardson had knowingly failed to remove the unsafe machine from service at an earlier time, it has colored the discussion of the violation at issue by the parties and the judge.[8]

The presence of a crack in the boom of the dragline is undisputed. There was also general agreement as to how long the crack had existed and that it had worsened over time. Numerous witnesses including Richardson testified that the crack, indicated by a drop in a pressure gauge, had developed sometime before Richardson's August 2 examination of the dragline. Richardson testified that he was told about the crack on August 1, the day before his examination, and that the crack "had extended a small amount from what they could see." Tr. at 233-234; Tr. II at 31, 130-131, 172, 187. He testified in addition that, on August 2, prior to his examination, he was told that the crack was getting worse. Tr. II at 64. When he examined the crack, he "could detect just a little movement . . . ." *Id.* at 137. Other witnesses corroborated the fact that the crack was getting larger; "it was moving a little." *Id.* at 172, 199.

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[8] An alleged violation arising out of the fatality was also tried before the judge: that Richardson had knowingly failed to ensure that the boom had been properly blocked or supported during repairs, as required by 30 CFR § 77.405(a). The judge found for Richardson on this point because there was insufficient evidence of the "knowingly" element. The Secretary did not petition for review on this matter, and it is not before us.

The testimony relative to the extent of the crack is somewhat ambiguous, and it is unclear whether Richardson realized the magnitude of the crack. Richardson testified that during his examination of the dragline from the catwalk, he could see a 10-inch long crack. Tr. II at 65, 66. The Secretary's witnesses reiterated that fact, and testified that the crack actually extended for about 29 inches of the chord's 38-inch circumference. Tr. at 94, 158-161, 217, 261.

There was also testimony by the federal mine inspector and a mechanical engineer familiar with the construction of the dragline that a 29-inch crack, or even the 10-inch segment visible from the catwalk, was serious enough to warrant removal of the machine from service. Tr. at 168-169, 266-267. Their testimony was substantiated by one of Richardson's witnesses, Peabody's director of heavy equipment. He testified in the hypothetical that if he had seen a 9-inch crack from the catwalk, and in investigating further had determined it was actually a 27-30 inch crack, he would have shut the machine down immediately. Tr. II at 263.

Richardson made a number of admissions, which go to the unsafeness of the dragline, as well as to his knowledge of the condition. He testified that he was concerned about the periodic recurrence of cracks in the boom. Prior to August 2, he had contacted the manufacturer for advice on repairs because he "wanted to achieve the possibility and reduce the chances of this area that had been cracked. It had been too numerous; it needed something to be stopped." Tr. II at 37-39, 64. Despite his testimony that he did not consider the machine to be unsafe, Richardson apparently decided that immediate repairs were necessary, because he stated "that we needed to make some repairs pretty quick." Tr. II at 66-67, 201. In response to a question about whether he believed that the machine should be shut down for repairs, Richardson answered, "As soon as I got the available equipment

over." *Id.* at 67. Therefore, his conclusion that the machine was safe is at odds with his testimony relative to the immediacy of the risk.

Other evidence also tends to show that the dragline was unsafe while it was in service. The Secretary introduced into evidence a letter from the dragline's manufacturer, Bucyrus-Erie, in which it commented on the Secretary's post-accident report. The letter stated: "The machine is equipped with a crack detection and warning system. The crack should have been repaired immediately when it was detected." Pet. Exh. 38.[9] Richardson also introduced evidence of prior cracks and repairs to support his argument that this crack was no different than many that preceded it and impliedly did not make the machine unsafe. We reject that argument. As the judge correctly stated:

> It is not enough . . . that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

We believe that the above evidence constitutes substantial evidence to support the judge's finding that the machine was unsafe while in service. We note, however, that the basis of the judge's finding of unsafeness is at least partially defective. The judge noted testimony by Richardson and his witnesses to the effect that the dragline was safe. However, he accepted as more convincing

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[9] Richardson argues that the judge's finding of unsafeness is "glaringly inconsistent" with the manufacturer's instructions for repair. This argument is without merit because the instructions relate only to support of the boom during repairs, not to the point at issue here, *i.e.*, the unsafeness of the machine before it was taken out of service. Richardson refers also to the letter from Bucyrus-Erie as "clearly inconsistent" with its field instructions, because it failed to mention what Richardson contends was a design defect and the proximate cause of the accident. Again, the cause of the fatal accident is not at issue.

the testimony of the Secretary's witnesses "*because* the ultimate breaking of the chord demonstrates that the machine was unsafe". (Emphasis added.) Richardson correctly argues that this basis for the judge's finding is unsound. The breaking of the chord on the day *after* the alleged violation occurred did not necessarily demonstrate anything about the safeness of the machine at the time of the alleged violation because, as found by the judge, the collapse was caused, at least in part, by a repairman's actions, and we do not rely on this rationale in reaching our decision.

One further evidentiary issue merits comment. The judge found that the dragline would have been safe and the violation at issue would not have occurred if the dragline had been equipped with a modified suspension system. This finding is largely irrelevant to the violation at issue because the question here is whether the machine, however equipped, was unsafe while in service. The fact of unsafeness, rather than the reason for the unsafeness, is relevant. If the machine was unsafe, 30 CFR § 77.404 (a) required that it be removed from service immediately.[10]

For the above reasons, we affirm the judge's finding that the dragline was unsafe at the time of the alleged violation.

Did the judge erroneously construe the "knowingly" element of section 109(c) of the Coal Act?

In his decision, the administrative law judge construed the term "knowingly" as used in section 109(c) of the Coal Act to mean "knowing or having reason to know." Richardson asserts that the judge should have applied a "willfulness" test, rather than what he terms a "negli-

[10] Although there was some controversy over the length of time Richardson allowed the machine to remain in service, this factor relates to the amount of the penalty, not to the fact of violation.

gence" test. Alternatively, he urges that the statute requires a showing of actual knowledge. We reject both arguments and affirm the judge.

The statutory provision and its legislative history provide little guidance on the construction to be given to the term "knowingly". Section 109(c), as enacted, adopted the language of section 308(c) of the Senate bill insofar as it dealt with an agent's knowing violation. Neither the Conference Report nor the prior Senate Report discussed the knowledge requirement.[11] The House bill imposed a "knowingly" element for criminal penalties against agents, but not for civil penalties.

Although Congress did not specify the meaning of "knowingly" that it intended to convey in section 109(c) of the Coal Act, we are persuaded that Congress did not intend that "knowingly" should be synonymous with "willfully." Section 109(b), which imposed criminal liability for violations, stated that any operator who "*willfully* violates a mandatory health or safety standard, or *knowingly* violates or fails or refuses to comply with any order issued under section 104. . . ." is subject to fine or imprisonment. (Emphasis added.) We believe that because the words "willfully" and "knowingly" were used in the disjunctive in section 109(b), and used singly in other sections of the Coal Act, *e.g.*, sections 109(c), (d) and (e), Congress must have intended the words to have different meanings. *See U.S.* v. *Illinois Central Ry. Co.*, 303

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[11] H. Conf. Rep. No. 91-761, 16, 71-72; S. 2917, 108; S. Rep. No. 91-411, 91st Cong., 1st Sess., 93 (1969); Legis. Hist. at 219, 889, 1515-1516.

The Mine Act's legislative history on section 110(c)'s continued use of the term "knowingly" sheds no further light on the issue. See H. Rep. No. 95-31, 20; S. Rep. No. 95-181, 40-41; and the Conference Report, S. Rep. No. 95-461, 57, 95th Cong., 1st Sess. (1977); reprinted in *Legislative History of the Federal Mine Safety and Health Act of 1977*, 95th Cong., 2d Sess. (1978) at 376, 628-629, 1335.

U.S. 239, 242, 243 (1938), *quoting St. Louis and S.F.R. Co.* v. *U.S.*, 169 F. 69, 71 (8th Cir. 1909); *see also, U.S.* v. *Consolidation Coal Co.*, 504 F.2d 1330, 1335 (6th Cir. 1974). Therefore, we reject Richardson's argument that "willfulness" must be shown in order to establish a violation of section 109(c).

The question remains, however, as to whether Congress intended the interpretation reached by the judge in this case, that "knowingly" means "knew or should have known." As the judge observed:

> The word 'knowingly,' as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending upon the context in which it was considered.

In our view, the judge correctly analogized the meaning of "knowingly" as set forth in *U.S.* v. *Sweet Briar, Inc.*, 92 F. Supp. 777 (D.S.C. 1950), to section 109(c) of the Coal Act. Although *Sweet Briar* involved the liquidated damages provision of the Walsh-Healey Public Contracts Act, 41 U.S.C. § 35 *et seq.* (1976), and not the imposition of a civil penalty as is involved here, that Act, like the Coal Act, has certain humanitarian objectives; under it Congress used the government's purchasing power to raise labor standards. 92 F. Supp. at 779. Consequently, we believe the court's reasoning is equally applicable to the statutory requirement at issue here. In *Sweet Briar* the court stated:

> '[K]nowingly,' as used in the Act, does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. at 780. We believe this interpretation is consistent with both the statutory language and the remedial intent of the Coal Act. If a person in a position to protect employee safety and health fails to act on the basis of information that gives him knowledge or reason to know of the existence of a violative condition, he has acted knowingly and in a manner contrary to the remedial nature of the statute.[12]

Did the judge err in concluding that Richardson knowingly permitted an unsafe machine to remain in service ?

The judge found that Richardson "knew or should have known that the 1260 dragline was unsafe," and did not remove it from service immediately. Therefore, "Richardson, as agent of . . . [Peabody] corporation, knowingly authorized, ordered or carried out . . . [a] violation [of 30 CFR § 77.404(a)]." The judge stated that "[i]t was the kind of situation which would raise a person's suspicion, particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel." He concluded that Richardson "had such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer [their] existence," as well as "considerable direct knowledge about a potentially dangerous situation."

Richardson submits that even if the judge's finding were properly based on a "should have known" test, it erroneously imputed to him knowledge of the machine's unsafeness, in view of his testimony that he was unaware of the modified intermediate boom suspension system and his lack of control over the purchase and installation of the system. Richardson contends further that his knowledge must be determined as of the time before the acci-

[12] We note that the judge's discussion of Richardson's "negligence" arose only in terms of evaluating the penalty assessment criteria of section 109(a)(1) of the Coal Act, now section 110(a)(1) of the Mine Act.

dent, and that no evidence demonstrates that he had any reason to consider the dragline unsafe.

We agree with Richardson that his knowledge must be determined as of the time of the violation at issue on review, *i.e.*, before the machine finally was removed from service and before the fatal accident occurred. We conclude, however, that the record overwhelmingly supports the judge's finding that Richardson knew or should have known the machine was unsafe while it was in service. Although Richardson emphasizes his ignorance of the modified intermediate boom suspension system, the judge did not base his finding as to Richardson's knowledge on the presence or absence of that system, nor do we. The judge observed that, even without knowledge of the suspension system and the protection it would have provided, Richardson had reason to believe the machine was unsafe. The judge relied for the most part on the same evidence recited in our previous discussion establishing the unsafeness of the dragline. We find that this evidence also establishes that Richardson, in view of his position as day shift master mechanic with general supervisory authority over the dragline, knew or had reason to know that the dragline was unsafe and should have removed it from service.[13]

Accordingly, we affirm the administrative law judge's conclusion that Richardson knowingly violated the mandatory safety standard at 30 CFR § 77.404(a).

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[13] Richardson also asserts that he cannot be held responsible for Peabody's failure to comply with the manufacturer's recommended equipment modifications because he had no control over the purchase or modification of equipment. This argument misses the mark. The violation at issue involves only the question of whether Richardson knowingly permitted an unsafe machine to remain in service. There was undisputed testimony, including admissions by Richardson, that anyone, including Richardson, could remove from service a machine considered to be unsafe. This is the duty imposed by the standard. Richardson's authority to order the modified suspension system or other equipment is irrelevant.

Is section 109(c) of the Coal Act unconstitutional because it imposes liability only on corporate agents?

The administrative law judge rejected as a ground for dismissal Richardson's claim that section 109(c) is unconstitutional because it denies him equal protection of law. The judge ruled that resolution of challenges to the constitutionality of a provision of the Act is reserved to the courts.

Before us Richardson reiterates his argument that section 109(c) of the Coal Act violates his constitutional right to equal protection because it subjects him to a penalty solely because his employer does business in a corporate form. He asserts that such a distinction is illogical and bears no rational relation to the objective of mine safety or to any difference between a corporate or other form of business. The Secretary argues that the judge correctly held that the Commission lacks the authority to decide the constitutional question raised. Assuming that the Commission has such power, the Secretary argues that section 109(c) does not deny equal protection to corporate agents because the classification in that section has a rational basis.

The threshold question we must decide is whether we have the power to determine the constitutionality of a provision of the Act. We acknowledge the traditional view that administrative agencies lack the power to decide whether legislation is constitutional because such authority is reserved to the courts.[14] K. Davis, 3 *Administrative*

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[14] Many of the cases generally cited for the proposition that an administrative agency may not decide constitutional questions stop short of an absolute bar to agency determination, or do so in conditional language. "Adjudication of . . . constitutionality . . . has *generally* been thought beyond the jurisdiction of administrative agencies." *Oestereich* v. *Selective Service Local Bd. No. 11*, 393 U.S. 233, 242 (1968) (J. Harlan, concurring) (emphasis added). *See Johnson* v. *Robison*, 415 U.S. 361, 368 (1974).

Law Treatise § 20.04, at 74 (1967 ed.). However, we find that view and its underlying rationale deficient with respect to the situation here presented. *See Southern Pacific Transp. Co.* v. *Public Utilities Commission*, 18 Cal. 2d 308, 556 P.2d 289 (1976); *see also*, "The Authority of Administrative Agencies to Consider the Constitutionality of Statutes," 90 *Harv. L. Rev.* 1682 (1977); and "Administrative Adjudication of Constitutional Questions; Confusion in Florida Law and A Dying Misconception in Federal Law," 33 *U. Miami L. Rev.* 527 (1979).

We note first that the Mine Act specifies that this Commission, rather than the United States district courts, has primary adjudicative jurisdiction over disputes arising under the Act. 30 U.S.C. § 823(d). Congress authorized the Commission to decide independently questions of fact, law and policy. *Id.; see also, Secretary of Labor* v. *Helen Mining Co.*, 1 FMSHRC 1796, 1800-1802 (1979), *pet. for review filed*, Nos. 79-2518, 79-2537 (D.C. Cir., December 19 and 21, 1979). A necessary concomitant of that authority is that this Commission, whose members are sworn to uphold the Constitution, must make its determinations in accordance with the Constitution. Every branch of the government is obligated to uphold the Constitution, and "a law repugnant to the Constitution is void." *Marbury* v. *Madison*, 5 U.S. 368, 391 (I Cranch 137) (1803). We believe that we cannot properly fulfill our duty to interpret the law and to apply it constitutionally, without at the same time deciding whether the law or a portion of it conforms to the Constitution.

We have examined with great care, and have found inapplicable to us, the arguments advanced for denying administrative agencies the power to resolve constitutional questions. The conventional view is that only Article III courts, insulated from the influences of both the executive and legislative branches, possess the independence necessary to render an impartial decision on a constitutional

question.[15] We note, however, that this reasoning is generally applied to administrative agencies significantly different from this Commission, in that they often have combined regulatory and adjudicatory responsibilities. Because we do not have these combined functions, but are vested with solely adjudicative responsibilities, we are not susceptible to any inherent bias believed to exist in agencies that simultaneously regulate, prosecute and adjudicate.[16]

We are insulated also from pressures that some fear might be exerted on adjudicatory components that are one part of a larger executive department. The Mine Act established the Commission as an independent administrative adjudicatory agency. Commission members are appointed by the President with the advice and consent of the Senate. Members are selected from persons "who by rea-

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[15] E.g., J. Monaghan, "First Amendment Due Process," 83 *Harv. L. Rev.* 518, 523 (1970).

[16] The Board of Tax Appeals (BTA) was established in 1924 as an independent adjudicatory agency in the executive branch, and retained that characteristic after being renamed the Tax Court in 1942. *Old Colony Trust Co.* v. *Commissioner*, 279 U.S. 716, 721, 725 (1929). 90 *Harv. L. Rev.* 1682, 1687, n. 29. Section 951 of the 1969 Tax Reform Act, 26 U.S.C. § 101(a) *et seq.*, converted the Tax Court to an Article I legislative court, but its prior designation as an independent adjudicatory agency in the executive branch did not change. Although the BTA initially divided sharply over its authority to decide constitutional questions (*Cappellini* v. *Commissioner*, 14 B.T.A. 1269, 1293 (1929)), it later found that it had such power and has since exercised it "with the apparent acquiescence of reviewing courts." 90 *Harv. L. Rev.*, *supra*, at 1687, n. 29.

The Occupational Safety and Health Review Commission, an independent adjudicatory agency with functions analogous to this Commission's, has stated that it has "no power to declare any portion of its enabling legislation unconstitutional." *Buckeye Industries, Inc.*, 3 BNA OSHC 1837, 1975-1976 CCH OSHD ¶ 20,239 (No. 8454, 1975). However, because the OSHRC did not discuss the underlying rationale for its conclusion, we find little that is instructive in its decision.

son of training, education, or experience are qualified to carry out the functions" of the office. Members are appointed for fixed terms of six years and can be removed from office only for "inefficiency, neglect of duty, or malfeasance in office". 30 U.S.C. § 823. We believe that this independence assures the necessary impartiality for deciding constitutional questions.

In addition to our institutional independence, the judicial nature of Commission proceedings adequately preserves due process. Our procedures are largely governed by the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*; notice and an opportunity to be heard are provided; parties may retain counsel; and hearings culminate in reasoned opinions rendered by experienced administrative law judges. These decisions may then be reviewed by Presidentially-appointed Commissioners who possess the requisite competence for exercising their adjudicatory powers. 30 U.S.C. § 823. Due process is protected further because aggrieved parties may appeal an adverse Commission decision to a United States court of appeals. 30 U.S.C. § 816. Therefore, because of our "essentially judicial procedures and experience," we avoid the potential for bias that would undermine our ability to decide constitutional issues. *Aircraft and Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 769 (1947); *Dobson* v. *Commissioner*, 320 U.S. 489 (1943). We believe that the judicial nature of our proceedings assures parties of reasoned consideration of their arguments and provides us with the institutional competence to decide constitutional issues, further distinguishing us from other agencies denied this authority by the courts. *See Oestereich*, 393 U.S. at 242 (J. Harlan, concurring); *cf. Glines* v. *Wade*, 586 F.2d 675, 676 (9th Cir. 1978).

Other reasons support our conclusion as well. It is generally agreed that, because of its expertise, an administrative agency may entertain constitutional issues at least to develop a factual record and clarify the issues for

ultimate disposition by a reviewing court. An administrative agency may also hear constitutional issues where it is possible that the administrative proceeding will leave no remnant of the constitutional question. *Weinberger* v. *Salfi*, 422 U.S. 749, 765 (1975); *Public Utilities Commission of California* v. *U.S.*, 355 U.S. 534, 539 (1958); *Far East Conference* v. *U.S.*, 342 U.S. 570, 574 (1952). It has also been stated that an agency may resolve constitutional questions "not by reviewing the constitutionality of its statute but by interpreting the statute and by applying constitutional principles to specific facts." *Babcock and Wilcox* v. *Secretary of Labor and Occupational Safety and Health Review Commission*, 610 F.2d 1128, 1139 (3rd Cir. 1979). We reject as undesirable and artificial, however, the conventional view that an agency may only compile a factual record relevant to a constitutional issue or apply constitutional principles to particular facts, but may not pass judgment on the ultimate question of the constitutionality of the organic act or portions of it. As a solely adjudicatory agency the Commission regularly considers myriad legal questions, many with substantial constitutional components. We decide due process claims and consider constitutional objections to rules, standards, or other administrative actions. It is our belief that the judicial role of the Commission, admittedly adequate for entertaining various constitutional objections to agency actions, also appropriately permits the Commission to entertain constitutional objections to the underlying statute, especially where, as here, review in a United States court of appeals is available.

Finally, there are also several important policy considerations supporting our authority to decide constitutional questions. In establishing the Commission, Congress intended that the Commission have primary jurisdiction over disputes arising under the Mine Act. The ability to pass upon constitutional challenges is a vital step in the resolution of many of those disputes, and is fully con-

sistent with Congress' expressed preference for administrative adjudication under the Act. Such administrative review, we believe, will foster efficient and expeditious resolution of constitutional issues, as it does with non-constitutional questions, reducing costs of litigation to the parties as well as reducing delays in the ultimate disposition of the cases in which such questions arise. We believe also that courts will benefit from the Commission's action in compiling a complete factual record and in analyzing the constitutional question presented within the context of that record and the statute that the Commission interprets on a daily basis.

In sum, we are persuaded that there is no valid reason for our refusing to address the constitutional challenge raised against the enforcement of the statute in this case. Therefore, we now turn to an examination of Richardson's equal protection claim.

The first inquiry made in examining a claimed denial of equal protection is whether a suspect class or a fundamental right is involved. If the regulation burdens a suspect classification or a fundamental right, a strict scrutiny test is applied. If a suspect classification or a fundamental right is not involved, a rational relationship test applies. *Vance* v. *Bradley*, 440 U.S. 93 (1979); *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976).

Both tests require analysis of the purpose of the legislation and the means the legislature has chosen to accomplish that purpose. Where the rational relationship test is applied, the law is presumed to be valid. The challenging party has the burden of proving that there is no rational reason for the means the legislature has used to reach its purpose or end. *See Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61 (1911), and *Williamson* v. *Lee Optical*, 348 U.S. 483 (1955). The fact that some legislation must, by its nature, classify people or activities is recognized by

the Supreme Court. *See Massachusetts Board of Retirement* v. *Murgia, supra.* The question is whether the means are rationally related to the ends.

Under the strict scrutiny test, once it is established that a suspect class or a fundamental right is adversely affected by a classification, the burden shifts to the government to show a "compelling state interest" to justify the legislation. The government must also prove that, not only is there a rational relationship between the purpose of the law and the means by which it is accomplished, but that the means are necessary to the accomplishment of those ends. A court must look to see whether there actually is a less restrictive alternative to the legislature's choice. *See McLaughlin* v. *Florida*, 379 U.S. 184 (1964); *In Re Griffiths*, 413 U.S. 717 (1973); *Weber* v. *Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972).

Persons classified according to the business form of their employer, *e.g.*, corporate agents versus non-corporate agents, do not fall within any of the suspect classifications. Nor does imposing liability for payment of civil penalties infringe on fundamental rights.[17] As the Supreme Court

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[17] The Court provided the following list of fundamental rights and suspect classes in *Massachusetts Board of Retirement* v. *Murgia, supra*, 427 U.S. at 312 n.3, 4: The fundamental rights: *E.g., Roe* v. *Wade*, 410 U.S. 113 (1973) (*right of a uniquely private nature*); *Bullock* v. *Carter*, 405 U.S. 134 (1972) (*right to vote*); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969) (*right to interstate travel*); *Williams* v. *Rhodes*, 393 U.S. 23 (1968) (*rights guaranteed by the First Amendment*); *Skinner* v. *Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942) (*right to procreate*). The suspect classes: *E.g., Graham* v. *Richardson*, 403 U.S. 365 (1971) (*alienage*); *McLaughlin* v. *Florida*, 379 U.S. 184 (1964) (*race*); *Oyama* v. *California*, 332 U.S. 633 (1948) (*ancestry*).

There is also a very limited middle ground: gender and age. The Court has shied away from labelling these classifications as being suspect, but in most gender cases and some age cases the Court has imposed a "substantial relationship" test, rather than either of the two standard tests: rational relationship or strict scrutiny. *See*

observed in *Murgia*: "[W]e have expressly stated that a standard less than strict scrutiny 'has consistently been applied to . . . legislation restricting the availability of employment opportunities.'" 427 U.S. at 313. Thus, Richardson must carry the burden of proving that the classification in section 109(c) is not rationally related to the purpose of the Act.

To assist in our analysis of the denial of equal protection claimed in this case, we turn to a discussion of six Supreme Court cases applying the rational relationship test. One of the more recent equal protection cases is *Massachusetts Board of Retirement* v. *Murgia*, *supra*. There the Court was faced with an equal protection challenge to a Massachusetts statute requiring that uniformed state police retire at age 50. Despite evidence that many persons over the age of 50 continue to be physically and mentally capable of meeting the rigorous demands of their profession, the Court found that the statute is "rationally related to furthering a legitimate state interest." 427 U.S. at 312. The Court conceded that "the state perhaps has not chosen the best means to accomplish" its purpose of protecting "the public by assuring physical preparedness of its uniformed police." 427 U.S. at 314, 316. In applying the rational relationship test, the Court stated:

> This inquiry employs a relatively relaxed standard reflecting the Court's awareness that the drawing of lines that create distinctions is peculiarly a legislative task and an unavoidable one. Perfection in making the necessary classifications is neither possible nor necessary. [citation omitted]. Such action by a legislature is presumed to be valid.

427 U.S. at 314.

Califano v. *Webster*, 430 U.S. 314 (1977) (*age*); *Craig* v. *Boren*, 429 U.S. 190 (1976) (*sex*); and *Personnel Administrator of Mass.* v. *Feeney*, 442 U.S. 256 (1979).

Smith v. *Cahoon*, 283 U.S. 553 (1931), concerned the imposition of certain licensing requirements upon commercial carriers, excluding private carriers and commercial carriers transporting agricultural and dairy products. The statutes in question carried criminal sanctions. The Court held that, although the state has "broad discretion in classification in the exercise of its power of regulation, . . . the constitutional guaranty of equal protection of the laws is interposed against discriminations that are entirely arbitrary." 283 U.S. at 566-567. The classifications drawn in the laws in question were found to be so totally arbitrary in their distinctions as to be violative of equal protection.

Colgate v. *Harvey*, 296 U.S. 404 (1935), concerned a tax scheme that imposed a higher tax on dividends derived from corporations outside the state then [sic] on dividends derived from resident corporations. This portion of the tax was found to be constitutional because the Court found a "fair and reasonable" reason for the differentiation. Another portion of the scheme taxed interest from interest-bearing securities, but exempted interest received on account of money loaned within the state, while taxing income derived from similar loans made outside the state. This portion of the tax was found to be unconstitutional. The Court found that the tax was not rationally related to the purpose of the Act—raising revenue. It noted that if the legislation had gone further and required that the income from in-state loans be invested within the state as well, then it would have had a purpose: increasing the actual wealth within the state. The Court declined to interpret the provision in this manner, however, "for that would be to amend [the provision] and not to construe it." 296 U.S. at 424. Thus, the Court did not reject the entire tax scheme, but rather invalidated only that portion for which it was unable to find a rational explanation.

In *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933), a Florida tax statute was challenged on equal protection grounds.

The purpose of the statute was to require the licensing of all stores. The act established a licensing fee on a per store basis, but the amount of the per store fee increased if the owner operated stores in more than one county. The Court was unable to find a rational reason for increasing the tax where an owner had a store in more than one county. The Court found that the statute was not aimed solely at large corporate chains, which frequently owned stores in more than one county, but that it was aimed at all store owners. The Court stated:

> The legislature of Florida has declared the purpose and object of the statute to be to tax every store owner and operator, and we should not go behind that declaration and attribute to the lawmakers some other ulterior design. Corporations are as much entitled to the equal protection of the laws guaranteed by the Fourteenth Amendment as are natural persons. [Citations omitted.] Unequal treatment and arbitrary discrimination as between corporations and natural persons, or between different corporations, inconsistent with the declared object of the legislation, cannot be justified by the assumption that a different classification for a wholly different purpose might be valid.
>
> Those provisions of § 5 which increase the tax if the owner's stores are located in more than one county are unreasonable and arbitrary, and violate the guaranties of the Fourteenth Amendment. 288 U.S. at 536.

Williamson v. *Lee Optical*, 348 U.S. 483 (1955), may be the seminal case concerning the Supreme Court's view of the requirements of equal protection and due process. In *Williamson* the Court upheld an Oklahoma statute that forbade opticians from filling or duplicating eye glass lenses without a prescription from an opthamologist or optometrist. The Court stated "that regulation of economic

interest will violate the principle of equal protection if such regulation fails to bear a rational relation to the objective sought." However, the Court went on to find the challenged statute constitutional:

> The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. [Citation omitted.] Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. [Citation omitted.] The legislature may select one phase of one field and apply a remedy there, neglecting the others.

348 U.S. at 488-89. The Court speculated on various rationales the legislature might have had in mind when enacting the legislation. From these speculations, the Court concluded that "[w]e cannot say that the regulation has no rational relation to that objective and therefore is beyond constitutional bounds." 348 U.S. at 491.

A final example of the Supreme Court's rational relationship analysis is *Idaho Department of Employment* v. *Smith*, 434 U.S. 100 (1977). The statute involved precluded any person who attended school during the day from receiving unemployment benefits. The classification challenged was night students versus day students. The Court stated:

> The holding below misconstrues the requirements of the Equal Protection Clause in the field of social welfare and economics. This Court has consistently deferred to legislative determinations concerning the desirability of statutory classifications affecting the regulation of economic activity and the distribution of economic benefits. "If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with

> mathematical nicety or because in practice it results in some inequality.'" *Dandridge* v. *Williams*, 397 U.S. 471,485 (1970), quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911). See also *Massachusetts Board of Retirement* v. *Murgia*, 427 U.S. 307 (1976); *Mathews* v. *De Castro*, 429 U.S. 181 (1976); *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). The legislative classification at issue here passes this test. It was surely rational for the Idaho Legislature to conclude that daytime employment is far more plentiful than nighttime work and, consequently, that attending school during daytime hours imposes a greater restriction upon obtaining fulltime employment than does attending school at night. . . . The fact that the classification is imperfect and that the availability of some students desiring full-time employment may not be substantially impaired by their attendance at daytime classes does not, under the cases cited *supra*, render the statute invalid under the United States Constitution.

434 U.S. at 101-102. Thus, despite the imperfection in the classification, the legislation was upheld because the Court found a rational reason to support the classification.

Richardson here argues that the classification of agents according to the business form of their employers cannot withstand constitutional challenge. Applying the rational relationship test we have examined whether the classification established by Congress in section 109(c) is rationally related to the accomplishment of its intended purpose. As discussed below, we find a rational basis for the classification in section 109(c) and reject Richardson's challenge.

The expressed fundamental purpose of the 1969 Coal Act is to "protect the health and safety of the Nation's coal miners." 30 U.S.C. § 801 (1976). Section 109(c) is intended to provide one vehicle for accomplishing this purpose by holding corporate agents who commit knowing vio-

lations individually liable. We believe that imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance. That this was the intent of Congress in enacting section 109(c) is clear. As stated in the legislative history concerning this section:

> The committee expended considerable time in discussing the *role of an agent of a corporate operator* and the extent to which he should be penalized and punished for his violations of the act. At one point, it was agreed to hold the corporate operator responsible for any fine levied against an agent. It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him.
>
> The committee recognizes, however, the awkward situation of the agent with respect to the act and his supervisor, the corporate operator, and his position somewhere between the two. *The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield.* The committee does not, however, intend that the agent should bear the brunt of corporate violations. It is presumed that the agent is often acting with some higher authority when he chooses to violate a mandatory health or safety standard or any other provision of the act, or worse, when he knowingly violates or fails or refuses to comply with an imminent danger withdrawal order or any final decision on any other order.

Legis. Hist. at 1041-1042 (Emphasis added.)

Furthermore, as stated by the Supreme Court in *Lindsley* v. *Natural Carbonic Gas Co.*, *supra*, "when the classification . . . is called into question, if any state of facts

reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted can be assumed". 220 U.S. at 78. The Secretary has proffered a further explanation in support of the rationality of section 109(c). In his brief the Secretary stated:

> Congress was obviously aware that it is often difficult to penetrate the corporate decision-making processes of large corporate mining operations and determine the precise involvement of individual officers, directors, and agents in any given situation. In contrast, when a mine is run by an individual partnership, or association, generally the operation is smaller and the individual, partner, or associate is involved in the day-to-day operation of the mine and thus is chargeable as a mine operator himself under the Act.
>
> The rational basis for the classification in [section 109(c) of the Coal Act] is the Congressional acknowledgement of the necessity for piercing the corporate shield and placing the blame directly on the individuals responsible for the violations.

Also, as stated by counsel for the Secretary at oral argument:

> One of the problems which concern[ed] the Congress when they considered the Coal Act was that while operators who conducted their business in the form of a partnership or sole proprietorship were directly and personally liable for violations of the Act, the decision makers in a mine conducting business within a corporate structure were insulated from such personal liability. . . . Congress also knew that a high proportion of the nation's coal mines are operated by corporate operators.
>
> In fact, as we noted in our brief, the top fifteen corporate operators of coal in this country produce

> forty percent of all the coal mined in the United States.
>
> To remedy this inequity, Congress chose to make corporate operators agents, as well as directors and officers, liable for knowing violations of the Act . . . .

We find that the explanations set forth in the legislative history and by the Secretary provide rational reasons for the classification made in section 109(c). We recognize that much of the reasoning for placing individual liability on agents of corporate operators would likewise be applicable to imposing similar liability on agents of non-corporate operators. Such agents are also in a position to secure compliance with the Act's requirements to assure the safety of miners, but unlike their corporate counterparts they are not subject to the threat of direct enforcement against them. As noted by the Supreme Court in *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970), *quoting Lindsley* v. *Natural Carbonic Gas Co.*, *supra*, however:

> If the classification has some 'reasonable basis', it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality'.

As also recognized by the Supreme Court, Congress "may take one step at a time addressing itself to the phase of the problem which seems most acute to the legislative mind". *Williamson* v. *Lee Optical*, *supra*, 348 U.S. at 488-489. Finally, as cogently stated by the Supreme Court in *Vance* v. *Bradley*, *supra*, where a statutory distinction does not burden a suspect group or a fundamental interest,

> . . . courts are quite reluctant to overturn governmental action on the ground that it denies equal protection of the laws. The Constitution presumes that, absent some reason to infer antipathy, even

> improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted. Thus, we will not overturn such a statute unless the varying treatment of different groups or persons is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.

440 U.S. at 96-97 (footnotes omitted).

Applying these principles we find that Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis, and therefore conclude that the classification in section 109(c) does not offend the Constitution.

Accordingly, we affirm the judge's conclusion that Richardson violated section 109(c) of the Coal Act by knowingly permitting mobile equipment in an unsafe condition to remain in service. We also affirm the $500 penalty assessed by the judge against Richardson.

/s/ Frank F. Jestrab
FRANK F. JESTRAB
Commissioner

/s/ A. E. Lawson
A. E. LAWSON
Commissioner

/s/ Marian Pearlman Nease
MARIAN PEARLMAN NEASE
Commissioner

R. V. Backley, Chairman, Concurring In Part And Dissenting In Part.

I must dissent from that part of the decision that upholds the constitutionality of section 109(c) of the Coal Act. I do so because I can perceive no rational basis for singling out the agents of corporate operators for violations of the Act and excusing other agents for the same acts. The purpose of the section is to penalize individuals responsible for the safety of the miners who knowingly fail in that responsibility. I fail to see how mine health and safety is advanced when agents who are guilty of some grievous act are allowed to escape liability solely because they work for a partnership or sole proprietorship.

In this regard, the Secretary's comments quoted on pages 19-20 of the majority are wide of the mark. The question is not whether the liability falls directly upon the partnership or sole proprietorship but whether it can be placed upon the *agent* of those entities. In the case of a corporation, both the corporation and those individuals enumerated in section 109(c), are subject to the assessment of a civil penalty. This is the case before us. However, under the same circumstances, the agent of a noncorporate operator would escape liability. Accordingly, I find no rational basis for the exclusion if the purpose of the section is to place responsibility where it properly belongs. In my opinion not only is the classification arbitrary but exculpatory. The exoneration of one class of offenders under the Act provides little support for the rational basis test.

/s/ Richard V. Backley
RICHARD V. BACKLEY
Chairman

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APPENDIX C

FEDERAL MINE SAFETY AND
HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
4015 Wilson Boulevard
Arlington, Virginia 22203

Jul. 12, 1979

Civil Penalty Proceeding

Docket No. BARB 78-600-P

SECRETARY OF LABOR, MINE SAFETY AND
HEALTH ADMINISTRATION (MSHA),
Petitioner

v.

KENNY RICHARDSON,
Respondent

Sinclair Mine; Peabody Coal Company
Drakesboro, Kentucky

DECISION

Appearances: J. Philip Smith, Esq., Office of the Solicitor, U.S. Department of Labor, for Petitioner; Rees Kinney, Esq., Sam Jarvis, Esq., Jarvis, Payton and Kinney, Greenville, Kentucky, for Respondent.

Before: Administrative Law Judge Michels

This matter is before me for hearing and decision upon the petition for assessment of civil penalty filed against Kenny Richardson, pursuant to section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 820(c) (the Act), charging Mr. Richardson with acting

as an agent for a corporate operator, Peabody Coal Company, and knowingly authorizing, ordering, or carrying out stated corporate violations of mandatory standards.[1]

The standards allegedly violated are 30 CFR 77.404 (a), which requires that machinery and equipment be maintained in a safe operating condition or otherwise removed from service immediately and 30 CFR 77.405(a) which prohibits men from working on or from a piece of mobile equipment in a raised position until it has been blocked in place securely. The equipment involved was a Model 1260 Bucyrus-Erie dragline which developed a crack in the lower chord or tube of the boom. In the process of repairing the machine, the boom collapsed and a welder fell to his death and others were injured. Following the accident, MSHA conducted an inquiry and thereafter charged the operator with three violations of mandatory standards, the two referred to above and one other not in issue in this proceeding.[2] Peabody did not contest the charges and the penalties assessed were paid for the two violations which have been alleged herein (Petitioner's Exh. No. 39). Thereafter, this action was brought which alleges in effect that Kenny Richardson is individually liable under the Act for the asserted violations of mandatory standards.

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[1] A hearing was held on this matter on March 21 and 22, 1979, in Evansville, Indiana. Petitioner and Respondent appeared through counsel. The parties have filed posthearing briefs and proposed findings and conclusions and reply briefs. Such proposed findings not adopted or specifically rejected herein are rejected as immaterial or not supported by fact.

The record consists of two volumes of transcript. In referring to the pages in the first volume, the citation will be as follows (Tr.); in referring to the second volume, the reference will be (Tr. II).

[2] The operator was also charged with violating 30 CFR 77.1713(c) for failing to keep an accurate record of the examination conducted during each shift (Petitioner's Exhibit No. 10; Tr. 77).

The parties are in agreement that these charges involving conditions which occurred under the Federal Coal Mine Health and Safety Act of 1969 were properly brought under the Federal Mine Safety and Health Act of 1977 (Tr. 17-19).

Findings of Fact

The Peabody Coal Company is a Delaware corporation and the operator of the Sinclair Mine which is located near Drakesboro, Kentucky. This mine is a surface strip coal mine which employs approximately 353 men. The daily production of the mine is about 15,000 tons (Petitioner's Exhibit Nos. 2, 3, 39; Tr. 64-67).

Kenny Richardson, whose full name is James Kenneth Richardson, is 45 years old. He lives at 22 Circle Drive, Greenville, Kentucky, and is presently employed by the Peabody Coal Company's Sinclair Mine at Drakesboro, Kentucky. He has been employed at the Sinclair Mine since January 4, 1964. His present position is day shift master mechanic which he has held since June of 1974. The duty of a master mechanic is to be a supervisor of repair work on the stripping equipment (Tr. II, 26-28). Mr. Richardson was the day shift master mechanic in charge of the 1260 dragline on Tuesday, August 2, 1977, and also on the days immediately preceding that date.

A dragline is a type of excavating equipment which casts a rope-hung bucket a considerable distance, collects the dug material by pulling the bucket towards itself on the ground with a second rope, elevates the bucket, and dumps the material on a spoil bank, in a hopper or on a pile (see *Dictionary of Mining, Mineral and Related Terms*, Department of the Interior, 1968, p. 346). The Bucyrus-Erie 1260 dragline used at the Sinclair Mine is such a machine. It is pictorially shown in Petitioner's Exhibit Nos. 17-21. The boom or beam of the 1260 dragline is approximately 225 feet long and weighs approximately 200,000 pounds. It is of triangular construction

with two 12-inch diameter tubes or "chords" at the top and one single 12-inch diameter chord at the bottom forming a triangle with the V part of the triangle at the bottom. The three chords which form the triangle are each 12 inches in diameter. The walls of the upper chords are 1 inch in thickness, whereas that of the lower chord is one-half inch in thickness. The outside circumference of the lower chord is 38 inches. The three chords are tied together with lacing tubes approximately 6 inches in diameter which form cross-bracing to reinforce the three main chords (Tr. 91-94, 240-241; Tr. II, 112-113, 132).

In its normal working position, the boom is held stationary at a 30-degree angle off the horizontal. The cables of the boom can be dismantled and the boom can be laid on the ground if necessary (Tr. 91-92, 240). The 1260 dragline can be moved by the operator under its own power without assistance from any other machine (Tr. 99).

This machine is equipped with a pressurized system to indicate a crack in the boom. Originally, nitrogen gas was put into the tubes under pressure. Prior to the accident on August 3, 1977, nitrogen was replaced with a compressed air system. There are gauges inside the house of the machine which show the pressure and if a crack develops in a tube the pressure will go down and be visible to the operator of the machine or the oiler (Tr. 233). The pressure in the tube had gone down prior to Monday before the accident, *i.e.*, prior to August 1, 1977, and the pressure system was turned off (Tr. 130-131, 233-234, 264). Edward Yevincy, company-wide master mechanic, had observed that the pressure gauge had gone down indicating a crack in the boom "a week maybe 10 days" before the accident (Tr. II, 187).

In 1968, Bucyrus-Erie recommended that the 1260 dragline be equipped with a "modified intermediate boom suspension system," also called the "change-over kit," a modification designed to support the boom from mast to boom support point. This system was not installed on the Sin-

clair Mine 1260 dragline and the reason is unknown (Petitioner's Exh. No. 38; Tr. 104). It was installed on the 1260 dragline used at Peabody's River Queen Mine, 6 miles away (Tr. II, 243-244). The 1260 dragline at Peabody's Black Mesa Mine also had the modified system installed (Tr. II, 266).

The modified intermediate boom suspension system would have been acceptable to MSHA in lieu of a block for repairing the boom (Tr. 104, 338). Mr. Richardson denied any knowledge of the suspension system. He testified that in his discussions with Bucyrus-Erie representatives about the cracks on the 1260 dragline he was never advised of the modified system (Tr. II, 55). However, Wayne Bowling, director of all heavy equipment for Peabody, was aware, prior to the accident, that the 1260 dragline at the Sinclair Mine did not have such system (Tr. II, 247). The modified system was installed on the Sinclair 1260 dragline after the accident (Tr. II, 57-58).

Sometime before August 1, 1977, a crack developed in the lower chord of the boom. The pressure in the tube had dropped a week or 10 days before indicating the crack had developed over a period of time (Tr. II, 187). Mr. Richardson testified he was first advised as to the crack 2 or 3 days before the accident (Tr. II, 231). He was told by Bob Coppage that the crack was getting worse on August 1, 1977, at about 2:30 p.m. (Tr. II, 31, 64). He examined the machine at that time. The crack was visible. He looked at it from the catwalk and could see approximately one-third of the crack or about 10 inches (Tr. II, 65, 66). Mr. Richardson told Bob Coppage that it needed repair (Tr. II, 66).

Mr. Richardson, after completing his inspection, did not consider the machine to be unsafe and he gave instructions that it continue to operate, that is, continue its normal coal digging. The machine continued to operate for about 15 or 20 minutes of Mr. Richardson's shift (Tr. II, 67, 100, 152). The machine was also operated into the

second shift for a short period of time (Tr. II, 130). When Mr. Richardson looked at the crack, he could detect "just a little movement" although it was hard to see well (Tr. II, 137). The area of the break was partly obscured by the cross-lacing tubes (Tr. II, 66).

Mr. Yevincy had noticed the crack a week or so prior to the accident and had notified the supervisor, the assistant supervisor, and the master mechanic at the time who was Gail Lee. Mr. Yevincy, on August 2, had also noticed that the crack was "moving a little" (Tr. II, 172).

Cracks had developed at the same point on the chord on the 1260 dragline before. The boom had been repaired a dozen times. On July 19, 1977, there had been a crack repaired by Mr. Yevincy (Tr. II, 124, 172-173; Respondent Exh. No. 1). Mr. Richardson talked with Bucyrus-Erie in July 1977 and was promised instructions for repair. He received certain specifications and instructions on the Saturday prior to the accident. He had also received in June of 1977, information on field repairs (Tr. II, 39-40, 43, 51; Respondent Exh. Nos. 2, 3).

The instructions received by Mr. Richardson from Bucyrus-Erie for field repairs were admitted into the record as Respondent's Exhibit No. 3. The following is the full text of the instructions for effecting repairs on the boom, except for the welding procedures:

FIELD REPAIRS

A. *SUPPORTING THE BOOM DURING REPAIRS*

In most cases the boom can and should be repaired while it is supported on the machine in its working position. Several methods can be used for access to the area to be repaired.

1. By using an auxiliary crane the welder can be suspended in a basket.

2. Special temporary ladders and platforms can be fabricated. If you require assistance in making these, contact the Service Department at South Milwaukee prior to making the repair.

3. Occasionally the machine to be repaired is in a mine which also has rotary drills. It is possible, depending on the machine location, to position the boom over the mast of the drill so that the repair work can be done from the mast of the drill.

If a section of main chord must be replaced or if numerous cracks are to be repaired, it may be necessary to lower the boom. In this case, the following method of supporting the boom should be followed:

1. As a general rule, use a minimum of four cribs. One under boom point, one under lower apex and one each above and below the chord which is to be removed or repaired. These cribs must be placed at a panel point.

2. When placing cribs, their height should be such that the boom chords are as straight as possible and so that no stress remains in the chord due to its dead weight.

3. Both sides of the boom must be supported even though only one side is to be repaired.

After inspecting the crack on August 2, 1977, Mr. Richardson discussed the method of repair with the second shift master mechanic, Gail Lee, and the day shift machine operator, George Barnett. They considered the possibility of swinging the boom up toward the spoil to make a better work area. There was no discussion of blocking the boom (Tr. II, 68-69, 96-98, 135). Mr. Richardson testified that he did not instruct the second shift mechanics; rather, he stated that he had advised them (Tr. II, 152). He testified further that while the procedure for repair was discussed, he did not set it up (Tr.

II, 99). Mr. Richardson described his participation in the discussion of the repairs as follows:

> A. I told [Gail] that as soon as he got his people over there to shut the machine down, go to work on it, get a good safe working area at the vicinity that he was going to work on the boom, make sure that they had their safety belts and everything in good order, and repair it, put the gussets on, and to talk it over with his crew and see which position that they would rather have the machine in; and I advised him to do that.

(Tr. II, 97).

After observing the crack, Mr. Richardson recognized that immediate repairs were necessary. He told Bob Coppage "that we needed to make some repairs pretty quick" (Tr. II, 66, 201). In response to the question of whether he felt that the machine should be shut down for repairs, Mr. Richardson answered "As soon as I got the available equipment to help over" (Tr. II, 67).

Mr. Richardson was fully familiar with the requirements of the law and the regulations relating to mining and specifically to mandatory standards 30 CFR 77.404 (a) and 77.405(a) (Tr. II, 77-80, 162-163).

The repairs, while discussed on the first shift, were actually begun on the third shift which ran from midnight to 8 a.m. Master mechanic Mr. Barber was in charge on this shift (Tr. 150-151). The method used in the past was to take a ladder and secure it to get down to the point of the crack and to use safety belts (Tr. II, 61). The repair on this occasion was approached in the same manner except that a platform for the welder to stand on was attached to the boom (Tr. II, 63). The intended method of repair was to first bevel 6 inches on the side of the lower chord and then to weld the opening solid. After welding the bevel, a gusset plate was to be welded to the chord for reinforcement (Tr. 95-97).

In this instance, the beveling was started approximately 4-½ inches above the 9 inches which were still intact of the 38-inch circumference of the chord. Roger Tapp, one of the welders, proceeded to cut the chord and when about 9 inches had been beveled, only 4-½ inches of solid wall remained. The lower chord was weakened to the point that it broke. The excess in the load placed on the two upper tubes by the weight of the boom pulling down caused the upper chords to bend upward. As the boom bent upward and back toward the machine, suspension cables running from the mast to the point of the boom went slack allowing the auxiliary support cables to go slack causing the boom to fall to the ground. At the point of the crack, the boom fell approximately 100 feet to the ground (Tr. 95-97, Petitioner's Exh. Nos. 17-35). The testimony and other evidence indicates that the lower chord, with a circumference of 38 inches, was cracked for approximately all but 9 inches (Tr. 94, 159-161, 217, 250, Petitioner's Exh. Nos. 15-15 [sic], 36).

As a result of the accident, the welder, Roger Tapp, fell to the ground and was killed instantly and other miners suffered some injuries (Tr. 85-86; Respondent Exh. No. 6).

During the repair work, the boom of the dragline was not blocked or otherwise secured in place, but was worked on while in its normal raised position for digging operations (Tr. 97, 270, 277). If the machine had been equipped with the modified intermediate boom suspension system, it would not have been necessary to block the boom, according to the testimony of MSHA personnel (Tr. 104, 338). Also, it would not be necessary to block the boom for welding on handrail steps or other work not involving the structure of the boom (Tr. 227-228).

The record fails to reveal the reason why the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. The literature

which Mr. Richardson received from Bucyrus-Erie does not mention such a system. There is no evidence that a lack of a suspension system on the Sinclair Mine's dragline was a matter of common knowledge at the mine. Only Wayne Bowling testified he was aware that this machine did not have this system (Tr. II, 247). The record does not show that he communicated this information to the Respondent or any other persons at the mine. Mr. Bowling asserts that he did not know whether the boom would have been prevented from falling had it been so equipped (Tr. II, 254).

The 1260 dragline at Sinclair without the modified intermediate boom suspension system was unsafe to operate with a crack in the chord. Inspector James Utley testified that it was unsafe because flexing of the boom through the continued use of the machine would enlarge the crack to the point where the chord would no longer hold. He testified, however, with full knowledge of the ultimate result and also with knowledge that there was no modified suspension system on the machine (Tr. 168). David Whitcomb, a holder of a Bachelor of Science degree in mechanical engineering and an authorized representative of the Secretary, likewise testified that the machine was unsafe with the crack in the chord because the crack would increase and the boom would eventually fall (Tr. 267).

Witnesses for the Respondent and the Respondent himself testified to the effect that the machine in their opinion was safe and that there had been no reason to foresee an accident. This testimony is that of Wayne T. Bowling, director of all heavy equipment (Tr. 235-249, 256-259); Ed Yevincy, company wide master mechanic (Tr. 176-177); George Wallace Barnett, day shift operator for Peabody (Tr. II, 201-202); and Mr. Richardson, the Respondent (Tr. II, 95, 267).

On the question of the safety of the machine, I accept the testimony of the authorized representatives of the

Secretary over the Respondent's witnesses because the ultimate breaking of the chord demonstrates that the machine was unsafe. I accordingly find that it was unsafe to continue to operate the machine.

For reasons explained in the discussion, as to the first alleged violation Kenny Richardson knew or should have known that the 1260 dragline was unsafe. As to the second alleged violation, he did not know or have reason to know that the boom of the 1260 dragline should have been blocked while men were working on it with the boom in a raised position.

Discussion

The charge in the petition is that the corporate operator, Peabody Coal Company, violated mandatory safety standards 30 CFR 77.404(a) and 77.405(a) and that Respondent "acting as an agent of the corporate operator within the meaning and scope of section 3(e) of the Act, knowingly authorized, ordered, or carried out each of the aforesaid corporate violations." The petition seeks a penalty of $500 for each of the two alleged violations.

The issues on the merits are (a) whether the corporate operator, Peabody, violated the standards cited, (b) if so, whether Respondent is its agent, and (c) whether Respondent knowingly, authorized, ordered, or carried out these violations. If a violation is found, there is a further issue as to the amount of the penalty to be assessed.[3]

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[3] Respondent has also raised a constitutional issue in this proceeding. He contends that section 110(c) of the Act violates certain of his rights guaranteed by the Constitution of the United States. Specifically, he argues that he is subjected to a penalty solely because his employer does business in the corporate form rather than as a partnership or some other business form and that this violates his constitutional right to equal protection of the law. Respondent previously appealed this case on such constitutional issue to the United States Court of Appeals for the Sixth Circuit. This petition was dismissed as premature by the court in an order

The initial question is whether Peabody Coal Company violated the standards cited. Peabody was not named as a party-respondent in this proceeding and it made no appearance. Prior to the hearing, Peabody, apparently in settlement of charges relating to the alleged violations of 30 CFR 77.404(a) and 77.405(a), paid penalties of respectively $2,050 and $750 as shown on a computer printout (Petitioner's Exh. No. 39; Tr. 360-362).

Respondent in his brief has not raised, at least directly, any issue as to the liability of Peabody, but MSHA lists this is an issue presented. MSHA contends it has shown in this proceeding that Peabody has violated the cited standards and it relies for its position on the decision of the Board of Mine Operations Appeals in *Everett L. Pritt*, 8 IBMA 216 (1977). MSHA also is apparently attempting to rely on the payment by Peabody of civil penalties as a basis for its position. In its posthearing brief, MSHA states "The corporate operator disposed of its case at the MSHA Assessment Office level, and the assessment imposed by that office is deemed to be the final order of the Commission pursuant to 30 CFR 100.6(c)." As to this latter argument, it is my view that the mere payment of penalties under assessment procedures set up by the Secretary is not an admission of guilt by the operator. MSHA conceded as much on the record by stating that it did not claim that the payment of the civil penalties by Peabody was an admission of liability on its part (Tr. 23-24).

The issue, therefore, is narrowed to whether there is a showing on this record of violations of the cited standards by Peabody. The corporate operator, as noted, was not present at the hearing and it had no opportunity in this

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issued April 25, 1979. The Respondent has preserved this issue. My ruling is the same as that in my prior order of November 28, 1978, in which I rejected this contention as a ground for dismissal.

proceeding to be heard on the alleged violations. The Board of Mine Operations Appeals held in *Everett L. Pritt, supra*, that in spite of an operator's absence, the operator could be found liable for the purposes of section 109(c) of the 1969 Act. This section is comparable to section 110(c) of the 1977 Act. Therein the Board stated, overruling the administrative law judge, that the clause "whenever a corporate operator violates a mandatory health or safety standard * * * " establishes merely a prima facie case under section 109(c) of the 1969 Act. According to the Board, MESA (now MSHA) must establish that the corporate operator violated the standard at issue "but such may be established in a section 109(c) proceeding in the absence of the operator as a party." Board Member Schellenberg dissented, observing that the Board's decision could result in a finding of liability on the part of the agent, though the corporation could be found to be not liable.

The Board cites two other cases decided by administrative law judges in which it asserts that its theory of the law has been followed. However, in those cases the judges made no finding, at least directly, of liability on the part of the corporate operator. In *MESA* v. *Ronald Corl*, Docket No. PITT 75-445-P (April 23, 1976), cited by the Board, the judge appears not to have dealt at all with the issue of corporate operator liability. The second case cited by the Board is *MESA* v. *Daniel Hensler*, Docket No. VINC 75-374-P (March 31, 1976). In that case, Judge Luoma found only that "the testimony presented in the instant case within my opinion constitutes *a prima facie showing of liability* against the operator *in a case where the operator is a party.*" [Emphasis added.]

In my view, the Board was wrong in its decision in the *Pritt* case. I agree with Board Member Schellenberg in his dissent, not only for the reasons he stated but because there is no way the condition precedent, so clearly set forth in the section, can be met where the corporate op-

erator has not had an opportunity to be heard.[4] Nevertheless, the precedent of the Board appears to be binding unless and until overruled by the Review Commission. The Board decision requires a prima facie showing of liability of the corporate operator as a condition precedent. I will therefore consider the evidence against the corporate operator in terms of the Board's theory as set out in the *Pritt* case.

There is another matter of a threshold nature and that is whether Mr. Richardson is an agent of the corporate operator, Peabody Coal Company. I find that he is. "Agent" is defined in Section 3(e) of the Act as "any person charged with responsibility for the operation of all or a part of a coal or other mine or the supervision of the miners in a coal or other mine." Mr. Richardson is and was a master mechanic on the day shift for the Peabody Coal Company. He was in charge of the 1260 dragline on the first shift and thus fits the definition of an "agent." He had general supervisory authority over the 1260 dragline involved in the alleged violations even though other master mechanics were in charge on the later shift. Thus, I find that Mr. Richardson was an agent for the corporate operator, Peabody Coal Company. See the *Hensler* case, *supra*, decided by the Board of Mine Operations Appeals, in which Daniel Hensler, the Respondent, was a section foreman.

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[4] It seems to me that the general solution in light of the language of section 110(c) is to name both the corporate operator and the individual in a joint action. In any such action, the corporate operator should not be permitted to settle the proceeding unless it admits to the alleged violations. *Cf. United States* v. *Consolidation Coal Company and Donald Kidd*, 504 F.2d 1303 (6th Cir. 1974). In that case the charge under the criminal subsection of the Act involved both the corporate operator and the individual. Even the Board of Mine Operations Appeals in the *Everett L. Pritt* case, 8 IBMA 216 (1977), while authorizing a separate trial against the individual, stated that it would be fairer and simpler to join related sections 109(a) and (c) proceedings (now 110(a) and 110(c)).

Alleged Violation of 30 CFR 77.404(a)

The first allegation against Mr. Richardson concerns the standard 30 CFR 77.404(a) which provides: "Mobile and stationary machinery and equipment shall be maintained in safe operating condition and machinery or equipment in unsafe condition shall be removed from service immediately."

The charge as set out in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 4), is as follows: "Mobile equipment in unsafe condition was not removed from service immediately, in that, a crack in the lower chord of the boom of the Bucyrus-Erie 1260 dragline was known to exist and not removed from service."

The evidence received in this proceeding is sufficient in my view to establish a prima facie case against Peabody Coal Company. The equipment, the 1260 Bucyrus-Erie dragline, had not been fitted with the modified intermediate boom suspension system and therefore was vulnerable to a collapse of the boom such as that which occurred on August 3, 1977. Under the circumstances, cracks in the chords of the boom made it highly unsafe. Two witnesses for the Petitioner, both authorized representatives of the Secretary, testified that the boom was unsafe. Their testimony, it appears, was based on their knowledge that the machine was not equipped with the modified intermediate boom suspension system (Tr. 168, 273). Both witnesses testified to the effect that the boom flexes and that each time a load is picked up and then dropped there would be a flexing which would tend to widen the crack until eventually the chord would be severed. Correspondence from Bucyrus-Erie (a letter to Mr. William Craft, dated September 22, 1977, Petitioner's Exh. No. 38), leaves no doubt that the machine in its condition was unsafe. The letter states: "[t]he crack should have been repaired immediately when it was detected."

Other testimony which will be reviewed in more detail below is to the effect that the equipment was not unsafe at the time on August 2, 1977, that Mr. Richardson was in charge. Mr. Richardson claimed in his testimony that the machine was safe and that it was the cutting into the new metal that made it unsafe. Other witnesses asserted that the machine was safe in their opinion, even though the lower chord had a crack in it of two-thirds its diameter. These witnesses were Wayne T. Bowling, director of all heavy equipment for Peabody, Ed Yevincy, oiler and machine operator for Peabody, and George Wallace Barnett, also an operator of the 1260 dragline for Peabody. Mr. Bowling knew that the 1260 dragline at Sinclair was not equipped with the modified suspension system although he claimed he did not know whether the system would have prevented the boom from falling. As to these latter witnesses, I construe their testimony to mean that, based on the condition as they understood it at the time, they did not believe it to be unsafe. The fact as now known that the broken chord was on a machine not equipped with the modified intermediate boom suspension system and that it was vulnerable to collapse leaves no basis for their contentions that it was safe. The crack was extending further because of the flexing of the boom and it was only a matter of time until the chord would break and the boom would fall, subjecting miners in the area to the hazard.

Accordingly, I find that the machine was unsafe to operate and pursuant to 30 CFR 77.404(a) should have been removed from service immediately. It was not removed, however, but continued to operate even after personnel had become aware that the crack was enlarging. Therefore, the evidence establishes a prima facie case against the corporate operator, Peabody Coal Company, for a violation of mandatory standard 30 CFR 77.404(a).

The Respondent is an individual and is charged under section 110(c) of the Act as an agent of Peabody Coal Company "who knowingly authorized, ordered, or carried

out such violation." Mr. Richardson testified that he had specifically instructed the miners to continue to operate the machine for the remainder of the day shift, a period of 15 to 20 minutes (Tr. II, 152). Thus, he authorized or ordered such violation and the only issue remaining is whether he did so "knowingly." Mr. Richardson admitted during his testimony that he was familiar with the two mandatory standards charged in this proceeding.

The word "knowingly," as used in civil and criminal statutes, is not a term of precise definition. The courts have given various shades of meaning to the word, depending upon the context in which it was considered. *See* 51 C.J.S. *Knowingly* (1969), and cases cited thereunder. There is no legislative history under either section 109(c) of the 1969 Act or section 110(c) of the 1977 Act which provides guidance in construing the meaning of this term. Moreover, neither the Board of Mine Operations Appeals nor the Commission has interpreted the meaning of the word "knowingly" in section 109(c) of the 1969 Act. The Commission has not yet construed the meaning of the word in the 1977 Act.

Respondent urges the test applied by Administrative Law Judge Schweitzer in *MSHA* v. *Harvel*, Docket No. DENV 77-40-P (November 16, 1978), in which he states as follows:

> "Knowingly," for the purpose of its application to this case regarding section 109(c), means done "intentionally" or "consciously," with knowledge of the facts. It requires more than that the act was done by way of oversight or inadvertence or was an accident, but it does not require that the act was willful, involving reckless disregard of the law.

MSHA argues that the word should have the same meaning as that under contract law, that is, knowing or having reason to know.

The only court case treating the question appears to be *United States* v. *Consolidation Coal Company and Donald Kidd*, 504 F.2d 1330, 1335 (6th Cir. 1974). There, the court in construing a criminal provision of the Act stated to the effect that "willfully" means something more than "knowingly" and that even "willfully" need not connote bad purpose, either to disobey or disregard the law or an evil motive.

In support of its position that "knowingly" means knowing or having reason to know, MSHA cites two other cases decided by administrative law judges which bear on this question, namely, *Secretary of Labor* v. *Cowin and Company, Inc.*, Docket Nos. HOPE 76-210-P through HOPE 76-213-P (Judge Broderick, September 14, 1978), and *MSHA* v. *A. W. Garrett et al.*, Docket Nos. NORT 76X400-P, etc. (Judge Steffey, June 30, 1977), as well as the United States District Court case, *United States* v. *Sweetbriar*, 92 F. Supp. 777, 780 (D.C.W.D.S.C. 1950).

In the *Sweetbriar* case, the court held:

> [T]he term "knowingly" as used in the Act [the Walsh-Healey Public Contracts Act], does not have any meaning of bad faith or evil purpose or criminal intent. Its meaning is rather that used in contract law, where it means knowing or having reason to know. A person has reason to know when he has such information as would lead a person exercising reasonable care to acquire knowledge of the fact in question or to infer its existence.

92 F. Supp. 777 at 780.

In my view, the meaning given to the term "knowingly" by the court in *Sweetbriar*, even though the court was considering a wholly different statute, is one which should be applied to the same term in section 110(c) of the Mine Act. If a showing of actual knowledge that the condition was unsafe was required, it would be applying an ex-

tremely strict standard to this civil statute. This does not appear to be the intent of Congress. Accordingly, I will construe the term to mean knowing or having reason to know. Such construction would be in accordance with the Congressional purpose to foster safety in the work place.

Applying such a standard, Mr. Richardson, as to the first alleged violation, *i.e.*, not removing unsafe equipment from service immediately, either knew or had reason to know that the equipment was unsafe under the *Sweetbriar* reasoning; *i.e.*, he knew or had reason to know when he had such information as would leave a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence. My reasoning will be developed in the paragraphs which follow.

Preliminarily, it should be considered that the 1260 dragline at the Sinclair Mine was not equipped with the modified intermediate boom suspension system. Had the machine been so equipped, there would not have been violations of either standard as alleged. MSHA officials concede that had the machine been equipped with the modified system, there would have been no need for blocking the boom. Additionally, the manufacturer in its letter of September 29, 1977, observed that such suspension system properly maintained and adjusted would have supported the boom when the lower chord was severed. It follows that had the machine been so equipped, it could have been safely operated for at least the periods at issue in this proceeding.

In Mr. Richardson's favor is the lack of any evidence that either he or any of his peers on the job site had knowledge that the 1260 dragline lacked the modified intermediate boom suspension system. Mr. Richardson testified, and there is no proof to the contrary, that he was without knowledge of the modified suspension system. He denied having any information of this system from the manufacturer, and the literature in evidence sent to him

by Bucyrus-Erie does not mention the modification. Other witnesses who worked with him considered the machine to be safe, *i.e.*, Ed Yevincy, oiler and machine operator, and George Wallace Barnett, also a machine operator. This testimony is illogical unless it is considered as their view prior to the accident and without their knowledge of the machine's lack of the supporting modified intermediate boom suspension system which would have prevented collapse. One witness, Wayne T. Bowling, director of all heavy equipment for Peabody, did know that the Sinclair Mine 1260 dragline had not been equipped with the modified system. It is something of a mystery why this information was not communicated to the management of the Sinclair Mine, or to the master mechanics but there is no evidence that it was. Apparently, Mr. Bowling did not know that such equipment was necessary to prevent the boom from falling when a chord is severed, although he should have known this.

Furthermore, Mr. Richardson had seen this boom crack a number of times and either had directed or seen others direct repairs. In none of those instances had the boom been blocked and the repairs had always been conducted safely.

In spite of those factors, Mr. Richardson at least had reason to believe that this 1260 dragline was unsafe. Even though he had no knowledge about the modified intermediate boom suspension system and the safety protection such would have provided, he did have considerable direct knowledge about a potentially dangerous situation. He either knew or had the responsibility for knowing as much as 10 days before the accident that a crack had developed in the boom. Ed Yevincy testified that the pressure gauge had gone down a week or maybe 10 days before. The pressure gauge is an important part of the safety equipment placed on the 1260 dragline. The very purpose of this gauge is to give a warning of a developing hazard. The manufacturer in its letter of September 29, 1977, re-

fers to it as a "crack detection and warning system." There is no clear evidence that Mr. Richardson personally knew of this lack of pressure until August 2, but he had the responsibility for operating this machine and should have known that the pressure was down.

More than that, Mr. Richardson knew 2 or 3 days before the accident that a crack had developed and he was told by Bob Coppage on Monday, August 1, that the crack had extended. It [was] not until August 2 at 2 p.m. that Mr. Richardson decided to examine the crack. At that time it was described as "getting worse." Mr. Richardson personally examined the crack, although from some distance, and he determined that it needed quick attention. Even though he could not see the entire crack, he was able to observe about a third of it, which indicated or should have indicated to him a very serious condition. Both Mr. Richardson's actions and his testimony suggest that he knew it was serious. Directly after observing the condition, he began discussions with other personnel about the method of repair. He told Bob Coppage that "we needed to make some repairs pretty quick" (Tr. II, 66). While he testified that he did not believe the machine to be unsafe, he did indicate in response to a question that it should be shut down for repairs "[a]s soon as I got the available equipment to help over" (Tr. II, 67).

Considering the evidence described above, there is no doubt that Mr. Richardson knew that he was faced with a very bad crack. It is also clear and his actions show that he knew it had to be repaired without delay. It follows that he must have known that at some point a complete break in the chord was possible as long as the machine continued to operate. Even if it is accepted, as it must be on the basis of this record, that Mr. Richardson was unaware of the lack of the modified intermediate boom suspension system, there is also no evidence that he knew one way or the other what would happen if the chord broke completely through. It was the kind of situation which

would raise a person's suspicion, particularly a mechanic with considerable experience, that something bad was happening which could well endanger personnel in the area. Mr. Richardson clearly had "such information as would lead a person exercising reasonable care to acquire knowledge of the facts in question or to infer its existence," that is, the hazardous and unsafe nature of the broken chord. *United States* v. *Sweetbriar*, *supra*. It is not enough, it seems to me, that Mr. Richardson had allowed the machine to operate with a cracked chord in the past. This means only that the miners were lucky it did not break in the past, not that it was safe or that it should have been considered as safe.

Mr. Richardson was faced with a situation which had the obvious manifestations of a hazard, that is, a serious crack and one that was spreading under use. Mr. Richardson recognized the seriousness of it by actions and words and should have known that he was dealing with a hazard to the miners. In spite of this, he specifically directed that the 1260 dragline continue to operate until the end of the shift.

Respondent argues in its brief that "immediate" does not mean the present instant but "a reasonable time in view of the particular facts and circumstances of the case under consideration." I reject this interpretation of the word "immediate." Although only 15 or 20 minutes were involved after Mr. Richardson had made his inspection and directed the continued operation of the machine, that was sufficient time for the chord to sever and the boom to collapse. The exact time in which the chord would have become completely severed under use was unpredictable. Accordingly, when the hazard was discovered the machine should have been taken out of use immediately, that is, at the exact time of the discovery .

Furthermore, the hazard was something that existed not only for the few minutes mentioned, but, in fact, for per-

haps a week or more. The pressure in the gauge was lost a week or 10 days prior to the accident. Mr. Richardson knew at least by August 1 that the lower chord was cracked and that the crack was expanding. The machine constituted a hazard even at that earlier time and Mr. Richardson either knew or should have known this.

Accordingly, for the reasons stated above, I find that Mr. Richardson knew or should have known that the 1260 dragline was unsafe and should have removed it from service immediately.

In summary, the evidence establishes a prima facie violation of 30 CFR 77.404(a) by the corporate operator, Peabody Coal Company, and that Respondent, Kenny Richardson, as the agent of such corporation, knowingly authorized, ordered, or carried out such violation.

Alleged Violation of 30 CFR 77.405(a)

The second allegation against Mr. Richardson concerns the standard 30 CFR 77.405(a) which reads in part as follows: "Men shall not work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

The charge as stated in the notice of violation dated August 4, 1977 (Petitioner's Exh. No. 7), reads as follows: "Men shall not be required to work on or from a piece of mobile equipment in a raised position until it has been blocked in place securely."

The evidence, I believe, is sufficient to establish against Peabody Coal Company a violation of this standard.[5]

Respondent contended or at least seemed to contend during the course of the hearing, that the standard was not applicable to this particular machine, the 1260 dragline.

---

[5] The discussion in the opinion above, with respect to the condition precedent of a violation by a corporate operator, is equally applicable to the alleged violation of this mandatory standard.

Respondent appeared to argue that because of the huge nature of the machine the alternatives mentioned by MSHA other than the modified intermediate boom suspension system were not really practical. These alternatives included lowering the boom to the ground or lowering it part way over a spoil pile. Both of these alternatives, as shown on the record, would create some difficulties. Nevertheless, I believe the record is clear that the boom could have been so blocked. The manufacturer in its instructions on field repairs recommends supporting the boom during repairs, in at least some circumstances, that is, where a section of the main chord must be replaced or numerous cracks are to be repaired. This demonstrates quite clearly that the boom can be supported and, of course, there was no other option but to do so in this case where the machine was not equipped with the modified intermediate boom suspension system. The point may be moot for the future, however, since the machine is now equipped with the modified system and in most, if not in all instances of repair, it may no longer be necessary to support the boom.

Respondent also argued that the 1260 dragline was not "mobile" equipment. The machine is large and cumbersome and apparently moves very slowly over the ground. However, it is operated and moved under its own power. In my view, it comes within the definition of the term "mobile" as used in the standard.

Accordingly, I find that the evidence establishes a prima facie case of a violation of the standard 30 CFR 77.405(a) by the corporate operator, Peabody Coal Company.

The remaining question is whether or not Respondent, as agent of the corporate operator, "knowingly authorized, ordered, or carried out such violation."

A principal argument of the Respondent is that he had no duty, authority or responsibility for the implementa-

tion of the repairs. He claims that such was the responsibility of other master mechanics, including Gail Lee of the second shift, and M. C. Barber, master mechanic of the third shift when the accident occurred. Also, Respondent denies that he instructed anyone to make the repairs and argues that there is lack of any direct evidence to the effect that he authorized, ordered, or carried out the repair procedures (Respondent's Brief, pp. 22-23). He maintains that he was home in bed when the accident occurred and cannot be held accountable for the repair activity.

The record shows that there are eight master mechanics at the Sinclair Mine working on three shifts. Each is in charge of certain machines during their respective shifts. Kenny Richardson, during the day shift, had the responsibility for three machines including the 1260 dragline. According to some of the testimony, the day shift master mechanics have no greater authority than the master mechanics on other shifts. However, the evidence shows they do have charge of ordering parts since parts are more readily available during the daytime. Furthermore, the daytime master mechanics, even if they do not specifically direct the repair work to be done on other shifts, wield significant influence over the method of such repairs. Wayne T. Bowling, companywide master mechanic, expressed it as follows:

> Q. What is the—you've made a distinction between the day shift master mechanics. Now what is the basis for that distinction if they have similar powers and authority?
>
> A. What is it? They are out at the times when we have the parts. In the daytime they do most of the setting up when there's a better class of people in the daytime for repairs, welders. We have more-experienced people on days a lot of times and that's the distinction we make.

> And they know where the parts are and they do their ordering before they turn in to their supply people what they need and the supply people in the daytime what it would take to keep the night shift—to help them out and to get the material down there.
>
> And then they go discuss it with them in the afternoon and they take over where they left off.

(Tr. II, 241).

Mr. Richardson's testimony on his own authority drew a distinction between instructing other master mechanics, and advising them. He generally testified that while he advised on the repairs, he did not instruct the other master mechanics. At one point, however, he testified that he did instruct them about the repairs to be made, but he did not instruct them as to how to do the repairs (Tr. II, 128).

Other witnesses testified, generally, that the daytime master mechanic made the decision on repairs. George Wallace Barnett, day shift operator, stated that materials and parts are ordered on the day shift and that as far as he knew, the master mechanic on the day shift makes the decision on the repairs to be made (Tr. II, 207). Gene Porter, the third shift oiler, testified that he supposed Mr. Richardson was the lead master mechanic at the mine (Tr. II, 225). John Cooper, day shift welder, testified he was told by the superintendent that Kenny Richardson was the lead master mechanic at the Sinclair Mine (Tr. II, 314). Wayne Bowling testified that Mr. Richardson was the "lead master mechanic" over this particular machine (Tr. II, 250). Kenny Richardson, at the investigational hearing conducted after the accident, according to the testimony of a witness, admitted that he had set up the work procedures for the repair of the boom (Tr. 305). Also, it was Mr. Richardson who contacted Bucyrus-Erie for instructions and assistance.

The evidence outlined above establishes that, at the very least, Mr. Richardson shared the authority for setting up

the procedures to repair the boom. He seems to argue because others shared the responsibility that he cannot be held liable. It seems to me that if Mr. Richardson had some responsibility along with others, the mere fact that the others are not charged in this proceeding would not relieve Mr. Richardson of his responsibility. Furthermore, the evidence is sufficient to show that Mr. Richardson was involved to a greater extent than merely sharing the responsibility with other master mechanics. While he claims that he only instructed the other mechanics in how to go about the repair, it is evident from the record that this instruction, in light of the superior authority held by the daytime mechanics, amounted to a virtual direction. It would be unlikely that other mechanics would countermand his instructions and the facts show that they did not do so in this case.

In the discussions and instructions concerning preparing for the repair work, no serious consideration, if any, was given to the matter of supporting the boom. Mr. Richardson gave instructions or advice on the general manner of preparing for the repair, along with certain safety precautions, but he failed to direct or authorize supporting of the boom.

The final question under this alleged violation is whether Mr. Richardson knowingly authorized, ordered, or carried out the violation. His knowledge or reason to know is much less clear than with the previously considered violation. In the prior violation the physical evidence was there for him to see; however, this situation is considerably different. In the first place, it was not a common practice to support the boom during repair work. Most of the evidence suggests that it was not considered necessary in the trade to support the boom, though this was probably based on the fact that other similar machines are equipped so as not to collapse. Specifically, it had been Mr. Richardson's prior experience that the boom could be repaired while in its raised position.

The manufacturer's instructions which Mr. Richardson had received prior to the accident indicate certain circumstances where the boom should be supported, but it does not state that this is necessary for safety or otherwise. In fact, the instructions state specifically that in most cases the boom can and should be repaired while supported on the machine in its working position. It is only in certain circumstances, such as where a main chord must be replaced or if numerous cracks are to be repaired, that lowering the boom "may be necessary."

The problem, in part, may have been that other 1260 draglines were equipped with the modified intermediate boom suspension system which, with the machine so equipped, would have supported the boom when the lower chord was severed. The issue here, however, is not whether Mr. Richardson had reason to believe the machine or the procedure was unsafe, as with the prior citation. It is solely whether he knew or should have known the boom was required to be blocked and authorized or ordered the repair without such blocking. It seems to me, considering especially that blocking would not have been necessary with the modified suspension system, that the situation was sufficiently confusing and ambiguous as to preclude a finding of knowledge on Mr. Richardson's part.

Accordingly, for the above-stated reasons, I find that Respondent did not know or have reason to know that the boom of the 1260 dragline should have been supported or blocked while men were working on it with the boom in a raised position.

Mr. Richardson's position is distinguishable from that of the operator. The operator is held to a standard of strict liability in a situation of this nature, whereas for the individual to be liable, he must have "knowingly" participated in the violation. Moreover, the operator in fact had knowledge of the lack of the modified suspension system on the machine because its employee, Mr. Wayne

Bowling, was aware of this deficiency. Mr. Richardson had no such knowledge.

Assessment of Civil Penalty

Pursuant to section 110(c) of the Act, a person found in violation "shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d)." Subsection (a) is here applicable and it provides that a violation shall be assessed a civil penalty by the Secretary which penalty shall not be more than $10,000 for each violation. Under subsection (i) of section 110, the Commission in assessing civil penalties shall consider (a) the operator's history of previous violations; (b) the appropriateness of such penalty to the size of the business of the operator charged; (c) whether the operator was negligent; (d) the effect of the operator's ability to continue in business; (e) the gravity of the violation; and (f) the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of the violation. The Board of Mine Operations Appeals held in *Daniel Hensler*, 5 IBMA 115 (1975), that only two of these criteria are inapplicable, namely, (b) and (d). I will hereafter consider the others.

There is no history of previous violations on the part of Mr. Richardson (Tr. 12). Since Respondent did not personally participate in the abatement of the violation, no weight is given one way or the other to good faith abatement (Tr. 14-15). The violation was grave in that the collapse could have occurred at any time and up to eleven men were exposed to the hazard of the boom falling (Tr. 180). Mr. Richardson was more than ordinarily negligent in that he knew or should have known of the unsafe condition of the machine over which he had responsibility.

The Secretary has recommended a penalty of $500 for each violation. In light of all the circumstances discussed in this decision, I believe that such a penalty is appropri-

ate and so assess that amount for the knowing authorization, ordering, or carrying out a violation of the mandatory standard 30 CFR 77.404(a).

Conclusions

1. The Respondent, Kenny Richardson, is subject to the jurisdiction of the Federal Mine Safety and Health Act of 1977.

2. For the reasons stated above, Respondent knew or should have known that the 1260 dragline was unsafe and by failing to remove it from service immediately, knowingly authorized, ordered, or carried out a violation of 30 CFR 77.404(a).

3. For the reasons stated above, Respondent did not know or have reason to know that the boom of the 1260 dragline should have been blocked or supported while men were working on the boom in a raised position, and accordingly did not knowingly authorize, order, or carry out, as charged, a violation of mandatory standard 30 CFR 77.405(a).

ORDER

It is ORDERED that Respondent, Kenny Richardson, pay the penalty assessed herein in the sum of $500 within 30 days of the date of service of this decision upon him.

/s/ Franklin P. Michels
FRANKLIN P. MICHELS
Administrative Law Judge

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APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 81-3060

KENNY RICHARDSON,
Petitioner,

vs.

SECRETARY OF LABOR; MINE SAFETY and
HEALTH REVIEW COMMISSION,
Respondent.

Filed Oct. 1, 1982

JUDGMENT ENTRY

Before: EDWARDS, Chief Circuit Judge; CONTIE, Circuit Judge; and ENSLEN, District Judge.

On petition for reveiw [sic] of an order of the Federal Mine Safety and Health Review Commission,

This cause came on to be heard on the transcript of the record from the Federal Mine Safety and Health Review Commission and was argued by counsel.

On consideration whereof, it is now ordered, adjudged and decreed by this Court that the findings of the Federal Mine Safety and Health Review Commission are affirmed.

It is further ordered that Respondent recover from Petitioner the costs on appeal, as itemized below.

ENTERED BY ORDER OF
THE COURT

/s/ John P. Hehman
JOHN P. HEHMAN
Clerk

ISSUED AS MANDATE: December 17, 1982
COSTS: None

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 81-3060

KENNY RICHARDSON,
Petitioner

vs.

SECRETARY OF LABOR; MINE SAFETY and HEALTH REVIEW COMMISSION,
Respondent

Filed Dec. 9, 1982

ORDER

Before: EDWARDS, Chief Circuit Judge; CONTIE, Circuit Judge; ENSLEN, District Judge.*

A majority of the court having not voted in favor of an *en banc* rehearing, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, it is ORDERED that the petition for rehearing be and hereby is denied.

Judge Enslen would favor rehearing.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

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* Honorable Richard A. Enslen, U.S. District Judge, Western District of Michigan, sitting by designation.

No. 82-1433

In the Supreme Court of the United States

OCTOBER TERM, 1982

KENNY RICHARDSON, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether Section 109(c) of the Federal Coal Mine Safety and Health Act of 1969, 30 U.S.C. 819(c) (superseded in 1978), and its successor, Section 110(c) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. V) 820(c), violate equal protection by imposing civil penalties upon agents of corporate mine operators who knowingly authorize health and safety violations but not upon agents of non-corporate mine operators who engage in similar conduct.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-1433

KENNY RICHARDSON, PETITIONER

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 689 F.2d 632. The opinion of the Federal Mine Safety and Health Review Commission (Pet. App. 8a-40a) is reported at 3 F.M.S.H.R.C. 8, and the opinion of the Administrative Law Judge (Pet. App. 41a-70a) is reported at 1 F.M.S.H.R.C. 874.

JURISDICTION

The judgment of the court of appeals was entered on October 1, 1982 (Pet. App. 71a). A petition for rehearing was denied on December 9, 1982 (Pet. App. 72a). The petition for a writ of certiorari was filed on February 28, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is a master mechanic employed by Peabody Coal Company at its Sinclair Mine near Drakesboro, Kentucky (Pet. App. 1a, 43a). His primary duty is to supervise repair of the mine's strip-mining equipment, including a dragline (*ibid.*).[1] Following investigation of a fatal accident at the mine, a federal inspector issued citations to Peabody Coal Company for violations of safety regulations.[2] One of the citations alleged that Peabody had violated a safety standard, 30 C.F.R. 77.404(a), by not immediately removing from service a dragline with a cracked boom (Pet. App. 9a, 42a).[3] The Secretary of Labor thereafter sought administrative assessment of civil penalties against petitioner, alleging that petitioner was an "agent" of a corporate operator (Peabody) and had "knowingly authoriz[ed], order[ed], or carr[ied] out" the safety violation (Pet. App. 2a, 9a, 42a; C.A. App. 5-7). See 30 U.S.C. (Supp. V) 815 and 820(c).[4]

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[1]A dragline is a piece of excavating equipment that uses a bucket suspended and operated by cables. The cables are suspended from two beams, one of which is the "boom" (Pet. App. 9a, 43a-44a).

[2]Peabody paid the penalties without contesting the citations (Pet. App. 2a n.1, 9a-11a).

[3]An examination of the boom after the accident disclosed that, before the collapse, the lower cord of the boom had been cracked in all but nine inches of its 38-inch circumference (Pet. App. 49a). If a dragline is operated with a crack in the boom, the crack will continue to enlarge (*id.* at 50a-51a). After inspecting the boom, Richardson personally authorized continued use of the dragline until repairs could begin (*id.* at 45a-46a, 57a, 62a). After repairs had begun, the boom fell to the ground, killing one miner and injuring two others (*id.* at 49a). Petitioner's responsibilities included deciding whether a piece of equipment should be taken out of service for safety reasons (1 Tr. 308-309).

[4]Petitioner's violation occurred while the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. 801 *et seq.* ("the Coal Act"), was in effect. However, the Secretary of Labor filed the petition for assessment of civil penalties under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. (Supp. V) 801 *et seq.* ("the Mine Act"), which superseded or amended many of the provisions of the Coal Act. Section 109(c) of the

2. The administrative law judge held that petitioner had knowingly authorized a violation of the safety standard by failing to remove the unsafe dragline from service and assessed a penalty of $500 (Pet. App. 55a-63a, 70a). The ALJ did not address the constitutionality of the statutory provision imposing the civil penalty, Section 109(c) of the Federal Coal Mine Safety and Health Act of 1969 ("the Coal Act") (Pet. App. 51a-52a n.3).

Petitioner sought discretionary review before the Federal Mine Safety and Health Review Commission. The Commission granted review and affirmed the civil penalty (Pet. App. 13a-18a). In addition, the Commission upheld the constitutionality of Section 109(c) (Pet. App. 23a-39a). The Commission found that "imposing personal liability on corporate agents furthers the overall goal of the Act by providing an additional deterrent to many of those individuals in a position to achieve compliance" (*id.* at 35a). Furthermore, the Commission noted that a high proportion of the nation's coal mines are run by corporate operators and that a decision-maker in a non-corporate mine is often "chargeable as a mine operator himself under the Act" (*id.* at 36a-37a). Thus, the Commission concluded that "Congress' imposition of liability on corporate agents is not totally arbitrary but has a rational basis" and is therefore constitutional (*id.* at 38a).

The court of appeals affirmed the Commission's decision sustaining the civil penalty and upholding the constitutionality of Section 109(c). Since "[t]he legislature may act to

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Coal Act, 30 U.S.C. 819(c) (superseded in 1978), and its successor, Section 110(c) of the Mine Act, 30 U.S.C. (Supp. V) 820(c), both deal with the assessment of civil penalties against corporate agents and are identical except for the redesignation of affected sections. As a result, the court of appeals chose to discuss petitioner's violation in terms of 30 U.S.C. 819(c). (See Pet. App. 8a n.1.) We have followed the same course here.

remedy part of a problem only," the court stated (Pet. App. 4a), the failure to subject agents of non-corporate operators to liability under Section 109(c) does not render that provision unconstitutional. The court recognized (Pet. App. 3a) that a "non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of 'operator' " and therefore be personally liable under Section 109(a)(1), 30 U.S.C. 819(a)(1). The court observed (Pet. App. 3a-4a) that the purpose of Section 109(c) is to "correct th[e] imbalance by giving the corporate employee a direct incentive to comply with the Act." The court thus concluded (Pet. App. 4a) that "[t]he congressional intent behind [Section 109(c)], to hold an additional group of decision-makers personally liable, is rationally related to the purpose of the Act—the enhanced safety of the mine worker" (Pet. App. 4a).[5]

ARGUMENT

The court of appeals correctly applied this Court's decisions regarding the constitutionality of classifications in economic legislation. The court's decision that Section 109(c) does not violate equal protection does not conflict with any decision of this Court or any other court of appeals and consequently does not warrant further review.

Where, as here, a statutory classification neither infringes on a fundamental right nor involves a suspect classification, it passes constitutional muster so long as it "classif[ies] the persons it affects in a manner rationally related to legitimate governmental objectives." *Schweiker* v. *Wilson*, 450 U.S.

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[5]District Judge Enslen dissented on the ground that establishing personal liability for corporate agents, while "exculpating" non-corporate agents, "does not rationally further Congress' stated purpose to protect *all* miners and to assure that all mine operators and miners comply with health and safety standards" (Pet. App. 6a-7a; emphasis in original).

221, 230 (1981) (citations omitted). *United States Railroad Retirement Bd.* v. *Fritz*, 449 U.S. 166, 174-176 (1980); *City of New Orleans* v. *Dukes*, 427 U.S. 297, 303 (1976) (per curiam); *Dandridge* v. *Williams*, 397 U.S. 471, 485 (1970). Particularly when economic legislation, such as the Coal Act, is challenged, "this Court consistently defers to legislative determinations as to the desirability of particular statutory discriminations." *City of New Orleans* v. *Dukes, supra*, 427 U.S. at 303 (citation omitted). See also *United States Railroad Retirement Bd.* v. *Fritz, supra*, 449 U.S. at 175; *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83 (1978); *Idaho Dep't of Employment* v. *Smith*, 434 U.S. 100, 101 (1977). This Court has recognized, in discussing another provision of the Coal Act, "that legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976) (citations omitted).

Petitioner contends (Pet. 7-9) that despite the "substantial constitutional latitude" afforded Congress in its treatment of different groups, Section 109(c) is "fundamentally arbitrary and inconsistent with the statute's expressed purpose."[6] Petitioner does not dispute, however, that holding

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[6]Petitioner incorrectly asserts (Pet. 7) that this Court's decision in *Liggett Co.* v. *Lee*, 288 U.S. 517 (1933), struck down a classification based on corporate status and is thus inconsistent with the court of appeals' decision. The decision in *Liggett Co. upheld* a state tax that drew a distinction between owners of chain stores and owners of single stores or distinct stores in voluntary cooperation (*id.* at 532). What the Court held unconstitutional was a tax that placed a heavier burden on stores with branches in different counties (*id.* at 533). This classification was based not on corporate status, but on the location of the business (*id.* at 535). *Liggett Co.*, therefore, is not inconsistent with the lower court's ruling in the case at bar. See *Friedman* v. *Rogers*, 440 U.S. 1 (1979) (state may prohibit the practice of optometry under a trade name); *Semler* v. *Dental Examiners*, 294 U.S. 608, 611 (1935) (state may deny corporations right to practice dentistry).

corporate agents liable for violations of the Act's safety standard is rational. Subjecting those persons most directly responsible for safety violations to individual liability is intended to deter knowing misconduct and increase safety-consciousness, thereby furthering the Coal Act's primary purpose, "to protect the health and safety of the Nation's coal miners." 30 U.S.C. 801(g)(1); *Donovan* v. *Dewey*, 452 U.S. 594, 602 (1981). See S. Rep. No. 91-411, 91st Cong., 1st Sess. 39 (1969).

This otherwise reasonable statutory provision is not made irrational by its failure to subject agents of non-corporate entities to liability as well. Congress deliberately chose to subject agents of corporate operators to personal liability. As the House Committee Report states (H.R. Rep. No. 91-563, 91st Cong., 1st Sess. 11-12 (1969)):

> The committee expended considerable time in discussing the role of an agent of a corporate operator and the extent to which he should be penalized and punished for his violations of the [A]ct. At one point, it was agreed to hold the corporate operator responsible for any fine levied against an agent. It was ultimately decided to let the agent stand on his own and be personally responsible for any penalties or punishment meted out to him. * * * The committee chose to qualify the agent as one who could be penalized and punished for violations, because it did not want to break the chain of responsibility for such violations after penetrating the corporate shield.

Because the inclusion of the classification was purposeful, it is logical to infer that Congress intended it to further the purposes of the Coal Act. See *Schweiker* v. *Wilson*, *supra*, 450 U.S. at 236.

As the court of appeals recognized (Pet. App. 3a), Congress may well have concluded that "any non-corporate mining operation is going to be relatively small, and the probability is that the decision-maker is going to fit the statutory definition of 'operator' " and thus be liable under 30 U.S.C. 819(d).[7] In a larger corporate mine, on the other hand, it is much less likely that an individual decision-maker would be exposed to liability as an "operator." Thus, Congress held this additional group of decision-makers personally liable to enhance the safety of mine workers (Pet. App. 4a).[8]

In the instant case, for example, petitioner is certainly not an "operator" of the Sinclair mine, which is one of the largest mines in the country. *1982 Keystone Coal Industry Manual* 731 (McGraw-Hill). If the mine were a sole proprietorship or partnership, it is much more probable that a person with Richardson's duties would bear personal responsibility under Section 109(a) as an "operator" of the mine. The court below correctly concluded (Pet. App. 3a-

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[7]An "operator" is defined in 30 U.S.C. 802(d) as "any owner, lessee, or other person who operates, controls, or supervises a coal mine." "It does not, however, include persons whose primary responsibility is to run the mine or supervise employees such as a superintendent or foreman unless such person meets the statutory definition of operator. These are agents of the operator." S. Rep. No. 91-411, 91st Cong., 1st Sess. 45 (1969).

[8]To be sure, as petitioner suggests (Pet. 14), there may be instances in which a particular decision-maker would not be personally liable under the Coal Act, as in a large non-corporate entity. As we have noted, however, the fact that the Act's classifications are imperfect does not render the provision at issue here unconstitutional. See, *e.g.*, *Vance* v. *Bradley*, 440 U.S. 93, 109 (1979). "It is enough that the Act approaches the problem * * * rationally; whether a broader [liability] scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." *Usery* v. *Turner Elkhorn Mining Co.*, *supra*, 428 U.S. at 19 (citations omitted). See also *Duke Power Co.* v. *Carolina Envtl. Study Group, Inc.*, *supra*, 438 U.S. at 94.

4a) that Section 109(c) "attempts to correct this imbalance by giving the corporate employee a direct incentive to comply with the Act." "It is by such practical considerations based on experience rather than by theoretical inconsistencies that the question of equal protection is to be answered" (*Railway Express Agency, Inc.* v. *New York*, 336 U.S. 106, 110 (1949) (citations omitted)). Furthermore, Congress could reasonably have concluded that the need for individual accountability was particularly "acute" (*Williamson* v. *Lee Optical Co.*, 348 U.S. 483, 487 (1955)) with respect to corporations because most large mines are corporate entities.[9] Consequently, the choices that corporate operators and their agents make about safety and health matters affect more miners than do the choices of their non-corporate counterparts.

The foregoing factors provide ample justification for the congressional classification at issue.[10] As the court of appeals acknowledged (Pet. App. 4a), a " 'statute is not invalid under the Constitution because it might have gone farther than it did' " (*Katzenbach* v. *Morgan*, 384 U.S. 641, 657 (1966), quoting *Roschen* v. *Ward*, 279 U.S. 337, 339 (1929)). Where fundamental rights and suspect classifications are not at issue, "[i]f the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical

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[9]Most of the largest coal mines in the nation are owned and operated by corporate entities. See, *e.g.*, *1982 Keystone Coal Industry Manual* 731, 753-756 (McGraw-Hill); *Standard & Poor's Register of Corporations* (1982).

[10]Contrary to petitioner's assertion (Pet. 9-10 n.9), it is "constitutionally irrelevant" whether Congress explained the distinction in treatment between corporate and non-corporate agents, "because this Court has never insisted that a legislative body articulate its reasons for enacting a statute." *United States Railroad Retirement Bd.* v. *Fritz*, *supra*, 449 U.S. at 179.

nicety or because in practice it results in some inequality' " (*Dandridge* v. *Williams, supra*, 397 U.S. at 485, quoting *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61, 78 (1911)). Thus, although such statutory distinctions may be "imperfect" (*Vance* v. *Bradley*, 440 U.S. 93, 109 (1979)), may "only partially ameliorate a perceived evil" (*City of New Orleans* v. *Dukes, supra*, 427 U.S. at 303), or may even appear "illogical" (*Metropolis Theatre Co.* v. *City of Chicago*, 228 U.S. 61, 69-70 (1913)), it is only "the wholly arbitrary act" that is unconstitutional (*City of New Orleans* v. *Dukes, supra*, 427 U.S. at 304). The statutory scheme challenged by petitioner cannot be considered wholly arbitrary.[11]

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[11] Petitioner argues (Pet. 9-12, 15) that although it may be rational to expose "top-level management officials" of corporate operators to liability, Section 109(c) is unconstitutional as applied to Richardson. It is clearly rational, however, to treat all decision-making agents of corporations in the same fashion. As a master mechanic, Richardson supervised repair of the mine's equipment (Pet. App. 1a) and thus had important responsibilities for assuring safety conditions in the mine.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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